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Supreme Court of the United States

OCTOBER TERM, 1931.

Number [redacted] 33

ADVANCE-RUMELY THRESHER COMPANY, INC., A CORPORATION,
Appellant,

vs.

A. M. JACKSON,
Appellee.

APPELLANT'S BRIEF.

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INDEX.

	Page.
Statement of Case	1
Assignments of Error	6
Chronology of Legislation	7
Foreword to Argument	16
Snyopsis of Argument	18
Point I. Financial Loss to Appellant	20
Point II. Proof Made of Public Interest	28
Point III. Real Object of Legislation	33
Point IV. The Remedy is Inappropriate	38
Point V. Apparent Object is Discriminatory	50
Point VI. Equal Protection Denied Appellant	65
Point VII. Business Not Affected With Public Interest	73
Conclusion	78

CASES CITED.

Adair vs. United States, 208 U. S. 161, 52 L. Ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764 ..... 52, 61

Adams vs. Tanner, 244 U. S. 590, 61 L. Ed. 1336 61

Adkins vs. Children's Hospital, 261 U. S. 525, 67 L. Ed. 785 ..... 17, 52, 55, 61

Advance-Rumely Thresher Co. vs. Johnson, 243 N. W. — 36

Allgeyer vs. Louisiana, 165 U. S. 578, 41 L. Ed. 832, 17 Sup. Ct. Rep. 427 52

Bratberg vs. Advance-Rumely Thresher Co., 61 N. D. 462, 238 N. W. 552 ..... 15, 33

Butchers' Union S. H. & L. S. L. Co. vs. Crescent City L. S. L., etc., 111 U. S. 746, 28 L. Ed. 585, 4 Sup. Ct. Rep. 652 53

Coppage vs. Kansas, 236 U. S. 1, 10, 14, 59 L. Ed. 441, 35 Sup. Ct. Rep. 40 ..... 52, 53, 61

Cochner vs. New York, 198 U. S. 45, 49 L. Ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133 52

Chesapeake & Potomac Tel. Co. vs. Manning, 186 U. S. 238, 46 L. Ed. 1144 17

Dwinnel vs. Boehner, 60 N. D. 302, 234 N. W. 655 15

Dunbar Bros. Co. vs. Con. Iron Steel Mfg. Co., 23 Fed. (2nd) 416 .. 23

Gaar, Scott & Co. vs. Green, 6 N. D. 48 68

Gulf Colorado, etc., Ry. Co. vs. Ellis, 165 U. S. 150, 41 L. Ed. 666 .. 49

Hardware Dealers Mut. F. Ins. Co. vs. Glidden, 76 L. Ed. — 29, 45, 63

Heiner vs. Donnan, — U. S. —, 76 L. Ed. Adv. Sheets 501 .... 35, 43

International Harv. Co. vs. Olson, 243 N. W. 248 47

Jackson vs. Advance-Rumely Thresher Co., 241 N. W. 722 8

Louis K. Liggett Co. vs. Baldridge, 278 U. S. 105, 73 L. Ed. 204, 49 S. Ct. 57 62

Minneapolis Threshing Machine Co. vs. Hocking, 209 N. W. 996.11, 12
Meyer vs. Nebraska, 262 U. S. 390, 67 L. Ed. 1042, 43 S. Ct. 625.. 61
Muller vs. Oregon, 208 U. S. 412, 52 L. Ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957..... 53
Mobile, etc., Co. vs. Turnispeed, 219 U. S. 35, 55 L. Ed. 78..... 35
New York L. Ins. Co. vs. Dodge, 246 U. S. 357, 62 L. Ed. 772, 38 Sup. Ct. Rep. 337, Ann. Cas. 1918C, 593..... 52
New State Ice Co. vs. Liebmann, 76 L. Ed. — 18, 30, 74, 80
O'Gorman & Young vs. Hartford Fire Ins. Co., 282 U. S. 251, 75 L. Ed. 324.....29, 52, 61, 62
Packer Corporation vs. Utah, 76 L. Ed. — 30
Palaniuk vs. Allis-Chalmers Mfg. Co., 220 N. W. 638.....11, 13, 14
Ribnik vs. McBride, 277 U. S. 350, 72 L. Ed. 913, 48 S. C. 545.... 62
State Freight Tax, 15 Wall. 232, 21 L. Ed. 146..... 17
Schlessinger vs. Wisconsin, 270 U. S. 230, 70 L. Ed. 557, 43 A. L. R. 1224 35
Truax vs. Corrigan, 257 U. S. 312, 66 L. Ed. 254, 42 S. Ct. 124.. 61
Tyson & Bros. vs. Banton, 273 U. S. 418, 71 L. Ed. 718, 47 S. Ct. 426 .....17, 62
Washington, etc., Co. vs. Roberge, 278 U. S. 116, 73 L. Ed. 210.... 18
Wilson vs. New, 243 U. S. 332, 61 L. Ed. 755, 37 S. Ct. 298, Ann. Cas. 1918A, 1024..... 61
Wolff Packing Co. vs. Court of Industrial Relations, 262 U. S. 522, 67 L. Ed. 1103, 43 S. Ct. 630.....17, 62
Williams vs. Standard Oil Co., 278 U. S. 235, 73 L. Ed. 287, 60 A. L. R. 596..... 18

Supreme Court of the United States

OCTOBER TERM, 1931.

Number 849.

ADVANCE-RUMELY THRESHER COMPANY, INC., A CORPORATION,
Appellant,

vs.

A. M. JACKSON,
Appellee.

APPELLANT'S BRIEF.

This appeal is by the defendant, Advance-Rumely Thresher Company, Inc., from a judgment of the Supreme Court of the state of North Dakota, affirming a judgment of the District Court of Hettinger county, North Dakota, in favor of the plaintiff and appellee, A. M. Jackson, for the recovery of the purchase price of a certain harvester-combine sold by defendant to the plaintiff.

STATEMENT OF THE CASE.

The plaintiff, A. M. Jackson, sued the defendant, Advance-Rumely Thresher Company, Inc., for the return of the consideration or purchase price by Jackson given, in the form of certain promissory notes, to the defendant for the purchase of a harvester-combine. The cause of action as pleaded is based upon and refers to Chapter 238 of the Session

Laws of North Dakota for the year 1919, hereinafter referred to as "the warranty law," which act reads as follows:

"Chapter 238.

Fixing Time and Warranty.

An Act Fixing the Time and the Manner of Warranty and Making Contracts Made in Violation Thereof Void.

Be It Enacted by the Legislative Assembly of the State of North Dakota:

Sec. 1. Reasonable Time to Discover Defects. Any person, firm or corporation purchasing any gas or oil burning tractor, gas or steam engine, harvesting or threshing machinery for their own use shall have a reasonable time after delivery for the inspection and testing of the same, and if it does not prove to be reasonably fit for the purpose for which it was purchased, the purchaser may rescind the sale by giving notice within a reasonable time after delivery to the parties from whom any such machinery was purchased, or the agent who negotiated the sale or made delivery of such personal property or his successor, and placing same at the disposal of the seller.

Sec. 2. Provisions Contrary to Preceding Section Void. Any provision in any written order or contract of sale, or other contract which is contrary to any of the provisions of this Act is hereby declared to be against public policy and void.

Approved February 26, 1919."

In substance the allegations of the plaintiff's complaint, admitted by defendant's answer, are as follows: On or about August 13, 1928, the plaintiff purchased the harvester-

combine in question in payment of which the plaintiff gave to defendant three promissory notes payable in the aggregate sum of $1,350. The harvester-combine was purchased by plaintiff for his personal use in the harvesting and threshing of grain crops raised by the plaintiff on farm lands, as the defendant well knew and was informed at the time of purchase. During the period of two weeks following the purchase of the machine the plaintiff undertook to operate it upon his farm and in his grain fields for the purpose of harvesting and threshing grain and gave the machine a fair trial and test. The machine could not be operated properly to harvest and thresh grain. It was defective in workmanship and material and unfit for use as a machine to harvest and thresh grain. Parts of said machine were defective and could not, by adjustments or repairs undertaken by plaintiff, be made to operate successfully. On or about September 5, 1928, the plaintiff rescinded the purchase of the said harvester-combine and gave notice to the defendant and to its agents who negotiated the sale that the plaintiff would refuse to pay the promissory notes above mentioned. Plaintiff demanded a return of the promissory notes and notified defendant that the machine had been placed at the defendant's disposal. The rescission and offer of plaintiff was rejected by defendant and defendant refused to surrender the promissory notes or retake or accept possession or delivery of the harvester-combine. It was further alleged in the complaint that, by reason of Chapter 238 of the Session Laws of 1919, the plaintiff, as a matter of contract between the parties, had a reasonable time after delivery of said machine to inspect and test the same; that said machine was inspected and tested within a reasonable time after its delivery; that it did not prove to be reasonably fit for the purpose for which it was purchased; that the sale

had been duly rescinded in conformity with the statute above mentioned and that plaintiff was entitled to a return of his promissory notes.

To this complaint the defendant pleaded that, at the time of the purchase of the harvester-combine by plaintiff, the plaintiff made and entered into a certain written order or contract with defendant wherein and whereby:

> "The plaintiff contracted and agreed that the said machine was purchased without warranty of any kind, with respect to material or workmanship, fitness for the purpose of purchase, or otherwise, and that the plaintiff as such purchaser would and did waive any and all warranties of every kind, express, implied or statutory, and all right to claim or demand any remedy for the breach thereof, and did agree unconditionally to pay the purchase price of said machine as represented by the promissory notes described in the complaint."

While admitting that the plaintiff was engaged in farming at the time of the purchase of the machine and that plaintiff purchased the same for his own personal use in the harvesting and threshing of his own crops, and so informed the defendant at the time of purchase, the defendant further pleaded that the plaintiff was also engaged as a dealer in the business of selling farm machinery; that, as such dealer, the plaintiff handled the commodities of defendant, purchasing the same at wholesale prices and making sales thereof at retail prices, and that the plaintiff was given the benefit of the purchase price of said harvester-combine at substantially less than the retail price of the said machine in consideration whereof the plaintiff made and entered into the contract above mentioned for the waiver of all warranties.

The defendant also pleaded by way of answer that Chapter 238 of the Session Laws of 1919 deprived the defendant of its liberty of contract guaranteed by the Fourteenth Amendment and that the effect of the act was to deprive defendant of its property without due process of law and to deny the defendant the equal protection of the law.

To this answer the plaintiff demurred, contending that the contract pleaded in the answer was void under the provisions of Chapter 238 of the Session Laws of 1919 and judgment was entered in favor of the plaintiff and against the defendant for the return of the consideration given for the harvester-combine and for costs.

On appeal to the Supreme Court of North Dakota the judgment of the District Court was affirmed.

By jurisdictional statement herein filed this appeal is shown to have been taken to review and reverse a final judgment against appellant rendered by the Supreme Court of North Dakota, that court being the highest tribunal in the state in which a decision of the subject-matter in controversy could be had, it being there shown that there was brought in question, by the controversy, the validity of a state statute on the ground of its repugnancy to the Constitution of the United States and that the decision of said court was in favor of the statute's validity.

The correctness of the conclusion, by the Supreme Court of North Dakota, that the warranty law mentioned does not violate the Fourteenth Amendment, is the single question presented by this appeal.

ASSIGNMENTS OF ERROR.

Comes now Advance-Rumely Thresher Company, Inc., a corporation, appellant herein, and for its assignments of error on appeal to the United States Supreme Court from the final judgment of the Supreme Court of the state of North Dakota, and says that there is manifest error on the face of the record in this that:

I.

The Supreme Court of the state of North Dakota erred in its decision and judgment herein appealed from in holding that Chapter 238 of the Session Laws of 1919 of said state, as applied to this appellant, is a valid exercise of the legislative authority of said state; and erred in its said decision and judgment in failing to hold that the said Chapter 238 of the Session Laws of 1919, as applied to this appellant, is unconstitutional and void as contravening the Fourteenth Amendment to the Constitution of the United States.

II.

The Supreme Court of the state of North Dakota erred in its decision and judgment herein in failing to hold that the enactment of Chapter 238 of the Session Laws of 1919 of said state, and each of the two sections of said act, as applied to this appellant, is a violation of and infringement upon the Fourteenth Amendment of the Constitution of this United States in this:

(1) That the said act and each of the two sections thereof deprives this appellant of its property and its right to make reasonable contracts, in contravention of said statute, without due process of law;

(2) And that the said act and each section thereof deprives this appellant of the equal protection of the laws.

III.

The Supreme Court of the state of North Dakota erred in failing to hold, on facts of which the court must take judicial notice, and upon facts adjudged by the court, that the said statute is an arbitrary and unreasonable restraint upon the liberty of contract guaranteed to the appellant by the Fourteenth Amendment to the Constitution of the United States and that the said statute shows upon its face that it is not an appropriate or reasonable remedy for the specific public evil to avoid which the legislation was adopted; and in failing to hold, as a matter of common, historical and judicial knowledge, that there is no possibility of a rational basis for the legislative judgment expressed in the said enactment.

IV.

The Supreme Court of the state of North Dakota erred in affirming the judgment of the District Court of the county of Hettinger, North Dakota, and in the entry of the final judgment appealed from.

CHRONOLOGY OF STATUTORY ENACTMENTS.

By way of introduction to its argument and to make clear that the statute in question carries with it no virtue of antiquity and that, as construed and applied in the manner now protested, the legislation is new, appellant respectfully submits the following:

In 1913 the Legislature adopted Chapter 218 of the Session Laws of that year which act is published by the sec-

tion numbers below written in Compiled Laws of North Dakota, 1913, as follows:

> "Sec. 5991. Written Warranty. Reasonable Time to Discover Defects or Breaches. Any person, firm or corporation purchasing personal property under a written warranty shall have a reasonable time after such purchase and the delivery thereof in which to ascertain whether or not the property so sold complies with the warranty, and whether or not there are any defects or breaches of warranty, and the question of what is a reasonable time shall in all cases be a question of fact for the jury."
>
> "Sec. 5992. Notice of Breach of Warranty, How and To Whom Given. Notice of any breach of warranty or defect in personal property, sold as aforesaid, for any breach of warranty in connection with said personal property, may be given either in writing or orally to the person, firm or corporation or to their agent in this state, who negotiated the sale or who made the delivery of such personal property or his successor."
>
> "Sec. 5993. Provisions Contrary to Preceding Sections Void. Any provision in any written order or contract of sale or other contract, which is contrary to any of the provisions of this act (Sections 5991-5993), shall be void."

The foregoing are the statutes to which the majority opinion refers (*Jackson vs. Advance-Rumely Thresher Company, Inc.*, 241 N. W. 722, 724; Tr., p. 16) as follows:

> "The Legislature recognized the necessity of legislation of this nature long before the enactment of Chapter 238, Laws 1919. See Chapters 218-219, Laws 1913."

But never, while these statutes remained unrepealed, did

the court apply them to any different effect than as stated in the dissenting opinion of Justice Birdzell (241 N. W. 724; Tr., p. 18) as follows:

> "In so far as the principal opinion in this case speaks of facts which point to the necessity for reasonable protection to those entering into contracts for the purchase of certain classes of farm machinery to the end that they may enjoy the ordinary legal remedies for the breach of such contracts as are made, I do not disagree with the opinion and I express no constitutional objection to such legislation. The first statutes that were passed were designed to give this protection. (Chapters 218 and 219 of the Session Laws of 1913, which are Sections 5991, 5992, 5993 and 6002 of the Compiled Laws of 1913.) These statutes did not seek to impose any warranty or other affirmative contract contrary to the real contract of the parties. They merely provided that a purchaser of personal property under written warranty should have a reasonable time in which to ascertain whether or not the property complied with the warranty and made the question of reasonable time in all cases one of fact for the jury. And they further provided that any notice of breach or of defects might be given either in writing or orally to the seller or to the seller's agent in this state who had negotiated the sale or delivered the property, or to his successor. They avoided any provision in a written contract to the contrary and any provision purporting to waive any right of action arising out of the sale before the cause of action had accrued. These statutes obviated the effect of harsh contract stipulations prejudicial to the full enjoyment of ordinary legal remedies for breaches of warranties actually made."

In 1917 the Legislature adopted the Uniform Sales Law (Laws 1917, Chap. 202) which is published in the Supplement to the Compiled Laws of North Dakota, 1913-1925, as Sections 6002a1 to 6002a79. Section 15 of the act, being Supplement to Compiled Laws, Sec. 6002a15, provides for an implied warranty of fitness in the sale of goods as follows:

> "Sec. 6002a15. Implied Warranties of Quality. * * *
>
> (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies upon the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for that purpose."

The Uniform Sales Law (Sup. C. L., Sec. 6002a69) provides certain remedies to the buyer for breach of warranty, including the particular remedy of rescission.

But it was and is a further circumstance, admissible under the Uniform Sales Law, that the implied or statutory warranty could be waived or abridged by written contract, and Section 6002a15, *supra*, further provides that:

> "An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith."

By the adoption of the Uniform Sales Law, Sections 5991 and 5992 of the Compiled Laws, first above mentioned, were expressly repealed.

See Supplement Compiled Laws, Sec. 6002a79.

Hence in 1919 the statutory fact was that Sections 5991, 5992 and 5993 were inoperative; an implied warranty of

fitness had been brought into statutory declaration; the remedies for the breach of the warranty were declared, including rescission by the buyer; and the implied warranty (with the remedies for its breach) was made subject to waiver by the express contract of the buyer.

In 1919 the Legislature adopted the act, the validity of which is here questioned, namely, Chapter 238, Laws of 1919.

This act is published as Supplement to Compiled Laws, Secs. 5991a and 5993a.

By opinion filed August 6, 1928, in *Palaniuk vs. Allis-Chalmers Mfg. Co.* (N. D.), 220 N. W. 638, 640, this statute was first given the construction now complained of, as follows:

> "This statute not only insures to the purchasers of machinery of the sort therein mentioned the right to rescind where it is unfit, but it goes a step further and makes any contract entered into, contrary to its provisions, void as against public policy. Thus it effectually insures that the implied warranty contemplated by Section 6002a15, *supra*, cannot be negatived by contract of the parties where such machinery is purchased."

It is true that on March 12, 1926, in the case of *Minneapolis Threshing Machine Co. vs. Hocking* (N. D.), 209 N. W. 996, 999, the statute was construed for the first time and it was there held, in substance, that the provisions in a written contract of purchase of threshing machinery, contrary to the provisions of the statute, were void. But the interpretation of the act was there carried only to a consideration whether the reasonable time for test of the machinery and for notice of rescission (provided by Chapter 238, Laws of 1919) could be restricted by contract to seven days, it

being held that the statute, allowing a reasonable time for such notice, would prevail over the written contract. And it was further held that notice of rescission must be given to the seller or to the agent who negotiated the sale and that such notice to agents of the seller, not authorized to receive the same, was ineffective.

This decision of 1926 did not forecast the full import of judicial conclusions arrived at in 1928. It was there expressly held (209 N. W. 1000) that all implied warranties could be waived by contract and that all remedies (except as provided by Chapter 238, Laws 1919) could be waived. But the contract of purchase in that case contained an express warranty of quality and the case therefore stands as one where (1) the existence of the express warranty was conceded and (2) where the court applied Chapter 238, Laws of 1919, in a *remedial* manner to the breach of the admitted warranty to allow a reasonable time for notice of rescission.

Inasmuch as Chapter 238, Laws of 1919, makes no affirmative declaration of any warranty and *merely assumes the existence of the implied warranty of fitness* (expressed in the Uniform Sales Law) it remained a fair possibility of future determination, after the decision of *Minneapolis Thresher Mach. Co. vs. Hocking*, in 1926, that the statute would finally be adjudged as remedially applicable only where the contract of purchase expressly declared a warranty of fitness or failed to negative the implied warranty of the Uniform Sales Law.

Far from excluding this possibility the court, in the decision of the Hocking case, in 1926, after finding that there was an express warranty, said:

"We, therefore, hold that, the parties to the contract

here in question having by express terms negatived and excluded all implied warranties, the defendant cannot claim the benefit of any such as might have been available had the contract not done so."

Notwithstanding the decision in the Hocking case, therefore, it remained a fair inference after 1926 and until the Palaniuk decision in 1928, that, where the implied warranty of fitness or quality were negatived by express contract, with no expressed warranties stated, the court would find nothing left, in the transaction of the parties, to which Chapter 238, Laws 1919, as a remedial statute, would apply.

So long as the language of the court was open to the inference that the implied warranty could be waived, the present constitutional objection could not be made.

It was not until 1928 that either the old law, Chapter 218, Laws 1913 (C. L., Secs. 5991, 5993), or Chapter 238, Laws 1919, its statutory successor, received a judicial interpretation to the effect stated in *Palaniuk vs. Allis-Chalmers Mfg. Co., supra,* that:

"Thus it (the statute) effectively insures that the implied warranty contemplated by Section 6002a15, *supra,* cannot be negatived by contract of the parties."

From 1913 until 1928, a period of fifteen years, Chapter 238, Laws of 1919, or the former act of similar substance, remained almost uninterruptedly in the statute with nothing appearing in the decisions of the court to the contrary of the statement of Justice Birdzell, dissenting in the instant case, as follows:

"The statute did not seek to impose any warranty or other affirmative contract contrary to the real contract of the parties. * * * These statutes obviated the effect

of harsh contract stipulations prejudicial to the full enjoyment of ordinary *legal remedies for breach of warranties actually made.*"

And throughout that period of fifteen years numerous reported decisions of the North Dakota Supreme Court indicate that both the members of the bar and the bench of the state were without comprehension of the potent qualities of defense, for the purchasers of farm machinery, which lay hidden in the provisions of these acts to be brought into force by judicial interpretation. From the reported decisions of the court it is obvious that neither counsel in the shaping of issues and the trial of many cases nor the court, in opinions upon the laws of warranty, had yet discovered the interpretive view which was finally expressed in *Palaniuk vs. Allis-Chalmers Mfg. Co., supra*, that Chapter 238, Laws of 1919, was not only a remedial measure, applicable where an existing warranty of fitness had been breached, but also an act of substantive force creating a warranty or effective to preserve the implied warranty of the sales law from the express waiver of contract.

Therefore the act in question, by force of judicial construction and application, finds its place in this record as if first enacted in the year 1928 to this effect:

(1) It declares or assumes the existence of an unwaivable warranty of fitness in the sale of the commodities described in Section 1 of the act.

(2) It preserves to the buyer a right of inspection and test during a reasonable time after purchase.

(3) It preserves to the buyer the right to rescind for breach of warranty of fitness, by notice to the seller or to his agent making the sale.

(4) And it declares that all contracts to the contrary shall be void.

The next decision, which concerned this act after 1928, was *Dwinnel vs. Boehner,* 60 N. D. 302, 234 N. W. 655, filed January 13, 1931.

Then came the decision, on August 22, 1931, in *Bratberg vs. Advance-Rumely Thresher Co., Inc.,* 61 N. D. 462, 238 N. W. 552, 78 A. L. R. 1338. There the question as to the constitutionality of Chapter 238, Laws of 1919, was first considered and decided.

In the Bratberg case an appeal to the United States Supreme Court was promptly allowed the Advance-Rumely Thresher Co., Inc., which is the appellant in the instant case, but the appeal was later abandoned in favor of the appeal in the case at bar.

Thus Chapter 238, Laws of 1919, was first construed to the effect here complained of in the Palaniuk case in August, 1928. For the first time the act was found to be constitutional in the Bratberg case in August, 1931, and the appeal in the instant case is virtually a substituted proceeding for the appeal, to this court, which was allowed but later abandoned in the Bratberg case.

NOVEL LEGISLATION.

Only by misdirection, therefore, may the court be led to the misconception that the "warranty law" has long been accepted and applied in North Dakota to the effect stated in these recent decisions.

The interpretation of the act now complained of, without which no question of constitutional law would arise, was neither expressed, intimated, nor forecast by the North Dakota Supreme Court until August, 1928, and then, im-

mediately, the Bratberg case commenced its slow progress through the courts to bring forward the objection of invalidity which is here presented.

FOREWORD TO ARGUMENT.

For reasons which appear in the following argument, we have felt that the form of exposition which has been adopted and the extended character of the discussion is made appropriate if not necessary by certain recent decisions of this court. But for such decisions a different and abbreviated presentation of the case might suffice as here interpolated:

Liberty of Contract.

The statute imposes a particular contract on the seller of the commodities mentioned in the act.

This is not a mere interference with the liberty of contract in a personal affair as in the case of interference with physical freedom. The restriction operates against the right to appropriate the property to the purpose of sale and is similar to a restriction upon the ordinary use of the property. The right infringed is a simple right of property included in the privilege of ownership of the property. The contract of sale is the only method of appropriating the property to one of the purposes of ownership.

In this respect the statute is identical in principle with price fixing statutes. It fixes part of the consideration the seller must furnish the buyer for the price paid. It limits the consideration to be paid by the buyer by restricting the obligation of the buyer.

The right of the owner to fix a price at which his property

shall be sold or used is an inherent attribute of the property itself and, as such, is within the protection of the due process clauses of the 5th and 14th Amendments.

State Freight Tax, 15 Wall. 232, 278, 21 L. Ed. 146.

Adkins vs. Children's Hospital, 261 U. S. 525, 67 L. Ed. 785.

Regulation of Business.

The appellant and many others are engaged in the business of selling these commodities. The statute affects each and every sale of either commodity and therefore has the practical effect of creating a restriction—if not a regulation—upon the business of sales. The case is thus brought within the field of decisions applicable to the liberty of contract guaranteed by the 14th Amendment and decisions applicable to the regulation of business.

The authority to regulate the conduct of a business or to require a license comes from a branch of the police power which may be quite distinct from the power to fix prices. The latter, ordinarily, does not exist in respect of merely private property or business, but exists only where the business or the property involved has become "affected with a public interest."

Chesapeake & Potomac Tel. Co. vs. Manning, 186 U. S. 238, 246, 46 L. Ed. 1144.

Tyson & Bros. vs. Banton, 273 U. S. 418, 71 L. Ed. 718, 58 A. L. R. 1236.

The business of selling these commodities is not affected with a public interest.

Wolff Packing Co. vs. Court of Industrial Relations, 262 U. S. 522, 67 L. Ed. 1103, 27 A. L. R. 1280.

Williams vs. Standard Oil Co., 278 U. S. 235, 73 L. Ed. 287, 60 A. L. R. 596.

New State Ice Co. vs. Liebmann, ...U. S....., 76 L. Ed....., Adv. Sheets, 479.

Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary upon the use of private property, or the pursuit of useful activities.

Washington, etc., Co. vs. Roberge, 278 U. S. 116, 73 L. Ed. 210, 211.

The statute is an unreasonable restriction upon the property rights and business of appellant for reasons summarized at the end of this brief.

By argument abbreviated to a few pages and by mere citation of the above mentioned cases we would submit this appeal with the assumption that those cases, and the authorities cited in the opinions, are conclusive here. None of those decisions appear to have been repudiated. But in the last two decisions of the court dealing with the matter of "liberty of contract" the appeals were disposed of by a rule which seems to make appropriate the following argument:

SYNOPSIS OF ARGUMENT.

As each of appellant's assignments of error is directed to the single contention that the warranty law is void under the Fourteenth Amendment, each division of argument below written may be taken as having reference to each assignment, as follows:

Point I. The effect of the act is to burden the business of appellant with serious financial loss, impair the value of its commodities held or acquired for sale, and arbitrarily deprive appellant of valuable rights of contract.

Point II. The alleged public evil for the remedy of which the legislation was adopted is affirmatively and conclusively established in this record and the point is not left for conjecture or surmise.

Point III. The object of the legislation is to save the purchaser of the named commodities from financial loss brought about by the purchase of articles which prove unfit for the purpose of purchase, where the sale has been induced by fraud.

Point IV. The statutory remedy for the public evil is inappropriate, arbitrary and unreasonable.

Point V. If the legislative object were taken to be that every buyer of an article of the described class should have the right to rescind if the article is unfit, regardless of the absence of fraud or the terms of his express contract, the law is discriminatory, unreasonable and void.

Point VI. The statute deprives appellant of the equal protection of the laws and creates a classification which is discriminatory, arbitrary and unreasonable.

Point VII. The business of selling the commodities in question is not so charged with a public use or interest that the regulation in question is justified.

Point I.

The Effect of the Act Is to Burden the Business of Appellant With Serious Financial Loss, Impair the Value of Its Commodities Held or Acquired for Sale, and Arbitrarily Deprive Appellant of Valuable Rights of Contract.

Before we may rightly ask the court for relief for an injury we must demonstrate that injury. It will be conceded that appellant is, and at the time of the adoption of the act was, engaged in the business of selling commodities described in Chapter 238, *Laws of 1919;* that appellant now is possessed of the right to engage in this business and to acquire and own the commodities mentioned for the purpose of sale or for any other purpose which may contemplate the full enjoyment of the right of ownership lawfully acquired.

But the conduct of this business of appellant is burdened by a regulation and the imposition of conditions which impair the value of that business and destroy the value of the commodities acquired and owned.

Confessedly the sale of these articles is neither *malum prohibitum* nor *malum in se.* When the combine was sold to Jackson in 1928 it was worth, except for this law, whatever the owner could get for it in a fair sale or exchange. The appellant then had the constitutional right to use or dispose of its property in any manner it might choose so long as its use or disposition of that property was without harm to others and without infringement of rights lawfully acquired by others.

The value of a trade is in the terms of the trade. Both parties were willing to and did deal according to a certain contract. Appellant exchanged its combine for the agree-

ment of appellee to unconditionally pay a specified sum of money and for the agreement of the buyer to waive all warranties and remedies for breach of warranty. But this legislative enactment arbitrarily imposed a different contract on the parties and purports to render void the contract which they did make. The statute wrote into the contract the implied warranty of fitness, found in the Uniform Sales Law, and erased the provision that the purchaser had waived all warranties.

The statute translated the accomplished fact of sale into a mere sale for trial. It impaired the value of appellee's unconditional promise to pay by transforming that promise into an agreement based upon conditions or contingencies yet to occur.

The sale was not alone subjected to the condition that the machine should thereafter be found to be fit for the purpose of purchase. The completeness of the sale was subjected to the contingency that the individual purchaser might claim that the machine was unfit and thereby render doubtful the finality of sale.

And there we touch the vital point.

The plain and unqualified terms of the sale, to which the parties were willing to and did agree, were made subject to controversy and the sale was made subject to the possibility of attempted repudiation by the buyer, both of which conditions would have been eliminated had the parties been allowed to contract as they chose to do.

By methods conventional in international relations it has been suggested that the payment of war debts shall depend on the collection of reparations.

Thus the collection of billions secured by simple contract is placed in doubt and the value of the bond is measured by the degree of self-interest which may lead the debtor to offer

or withhold payment of the debt. It cannot be doubted that the value of the contract for which this money was exchanged would be greater if there had been an express "waiver" of right to make any such claim. On the other hand that value would now be entirely gone had the legislature of Versailles provided that the debtor should actually have the right to assert the defense to payment now mentioned.

The similitude may not be exact. But we are illustrating the ease with which contracts may be encumbered with doubt and their value impaired even in the case where self-interest, as the author of doubt, holds no office under the statute.

It may be suggested at this point that the seller has his day in court. He may refute the claim of unfitness. That, of course, is the theory of law. But aside from the statute he assumed no obligation with respect to fitness.

We go behind the transaction where a jury may reasonably decide whether a rescission has been made in a reasonable time after a machine has been reasonably tested and found not reasonably fit.

We point out that the taking of a seller's property without due process occurred at the point where the seller was *denied the right to contract to avoid controversy* or question about the merits of the machine, or denied the right to make a warranty of such reasonable form and substance as the parties were willing to agree upon. For the point is not subject to doubt that an express warranty in each case may be written which fairly and justly will protect the interests of the buyer without giving to the buyer the full and unqualified contract of the implied warranty of fitness now stated in the Uniform Sales Law; a warranty which will not reduce the business of appellant to a speculation.

When it is considered that the legislative grant to the buyer is an unqualified warranty of fitness it becomes im-

portant to examine the scope of that warranty in the circumstances of this case. What article is or is not fit for the purpose of the purchase is made a jury question. As the state of North Dakota is exclusively agricultural it becomes natural and consistent with their own economic views and personal sentiment for a jury to see the question of fitness from the standpoint of the buyer. There is no standard of law to go by. The question of fitness becomes a question whether the machine would harvest grain or thresh grain, under the peculiar physical conditions which the buyer had in mind. As stated in *Dunbar Bros. Co. v. Con. Iron Steel Mfg. Co.*, 23 Fed. (2nd) 416, 419:

> "A warranty of merchantability is a warranty that the goods are reasonably fit for the general purpose for which they are sold, while a warranty of fitness is a warranty that the goods are suitable for the special purpose of the buyer, which will not be satisfied by mere fitness for general purposes."

A single defective part could render the machine unfit for the purpose of purchase, in the view of a jury, though the part might, under reasonable contract, be replaced almost instantly and without any loss to the buyer. Likewise the machine for mere lack of proper adjustment of the parts, might fail to accomplish the object of purchase—which purpose was, let us say, not only to thresh the grain but thresh it without interruption in one day; a purpose not merely to thresh but to operate the machine on a side hill or under other conditions unfavorable to successful operation.

To cover any of the numerous and varying circumstances of sale and purchase, reasonable and just contracts could be made and agreed upon which would vary from the statutory warranty of fitness. That warranty is one to which the

buyer is undoubtedly entitled if it is expressly provided for or if the implied warranty is not expressly negatived. We are not complaining that it is an unreasonable warranty but we ask that the far-reaching nature of that warranty be considered with the fact that the buyer is given its benefit in spite of his contract, in spite of the price fixed, or other circumstances of the sale which are attractive to the buyer and which form an inducement for his willingness to waive that warranty.

The value of the warranty is taken from the seller and granted the buyer. Its existence or absence is part of the price received or paid for the commodity, exactly as the seller might include or exclude an extra belt with the separator.

The effect of this statute is to reduce an otherwise legitimate business to a pure gamble or speculation with the odds against the seller. The speculation is not alone whether the machine is fit, but whether the buyer will repudiate the sale, in good faith or otherwise, for good reason or otherwise, in the alleged exercise of his statutory right. By this statute all of the sales business of appellant is made subject to controversy, over the question of quality, and subject to delays of collection, court expense and losses which otherwise could be avoided by fair contract.

And, obviously, the value of the specific article is impaired. In this connection we present appellant as the owner of a combine in 1928 with the same constitutional rights as a farmer who owns a new or second-hand machine. It is not only adaptable to use upon his farm but it may be disposed of by sale or exchange. But its value is impaired by the statutory condition which follows every transfer of the property. Not merely because the machine is, or in time may become, unfit for the purpose of threshing grain but

because the transferee may make questionable and subject to controversy, the right of the seller to retain the purchase price.

By the foregoing we have sought to free from any doubt the fact of loss, damage and injury which follows the application of this statute (1) to appellant's business of selling for profit the commodities specified in the act and (2) to appellant's ownership and right to acquire and dispose of such commodities in whatever way it might choose.

It is not within our privilege to offer testimony before this court nor allude to any fact not self-evident or commonly known. And doubtless all should be now bound by those declarations of the North Dakota Supreme Court which reflect matters of judicial knowledge. But with the utmost respect for the court below we find it necessary to question the statement of the majority in the instant case (241 N. W. 724, Tr., p. 16) as follows:

> "Viewed from a practical as distinguished from a legalistic standpoint it is apparent that Chapter 238, Laws 1919, has not imposed any conditions upon the purchase and sale of farm machinery that seriously interfere with such business in this state. The law became effective July 1, 1918 (1919), and since that time has affected all contracts for the purchase and sale in this state of machinery of the kind described in the statute. * * * And, although there apparently has been a substantial decrease in litigation concerning farm machinery, cases have arisen involving the construction and application of the statute."

Your Honors will observe that this statement is not and cannot be based upon any evidence in the case or upon any evidence which could possibly have been received in the case.

It is not and cannot be a matter of common knowledge. It represents an assumption of fact that, with respect to the private financial affairs of an industry annually involving millions of dollars of business with hundreds of thousands of people, the warranty law has had no practical adverse effect. If that statement is true and conclusively stated we have before this court nothing more than a mooted theory of constitutional law which is without practical application to the loss or gain of any person.

The statement is the product of misconception. It sets forth a perfect *non sequitur*. In the first place, it is remarked that this statute has affected the contracts for the purchase and sale of these commodities since July 1, 1919. Granting this as a correct statement of the legal effect of the law, we have demonstrated in our opening statement of fact that the proposition that this act had any further effect than as declared by Justice Birdzell, dissenting, was unknown, and first conceived in the Palaniuk case in August, 1928.

Pointedly the court shows that litigation covering farm machinery has diminished (except for the recent cases which cover the construction or validity of this act) and accordingly it seems to be intimated that no harm has been caused because litigation has diminished rather than increased.

It is certainly true that litigation has diminished. These last decisions show the reason. The buyer may take the machine and uses it for one, two, three or more seasons. If it needs repairs or adjustments or replacements the seller attends to that. If the buyer has continued in the use of the machine until its value is gone, after he has continued to renew or make payment on his paper from year to year, he may claim in court that the machine did not work and that everything he did was influenced by the seller's agreement to make the machine fit for the purpose of purchase.

Thereby he may recover the purchase price and interest if a not unfriendly jury will agree with him. The statute opens the doors to the perpetration of fraud on the seller which cannot be closed by mutual agreement.

There is but one practical thing for the seller to do when the buyer believes a machine defective or finds repudiation consistent with financial convenience. It must take back the old machine and pay back the consideration with interest; because the alternative is to "go to law" and pay the expense of litigation.

To contend that the seller may prove the true facts and protect his interests in court, to maintain that the seller's day in court is due process is to ignore the basic fact that the exercise of its constitutional right of contract by the seller could have avoided the seller being subjected to litigation.

The suggestion that no harm has been done because collection litigation has diminished refutes itself. Surely the Supreme Court of North Dakota did not intend to give testimony as to the reasons why litigation had decreased or as to the extent of harmful effects upon the business immediately affected! Litigation has diminished because it is so harmful to the seller. The claim of unfitness is subject to so wide and limitless a field of varying facts—both in respect of the character and condition of the commodity and the physical conditions under which the buyer proposed to use it—that there is little room indeed for the successful contradiction of that claim.

To every suggestion that has or may be made that this law is without injury in fact to appellant, there is another and conclusive answer. The right of contract guaranteed by the constitution is, in this case, a right incident to the ownership of property. By the exercise of that right property may be

devoted to the purpose of sale and its value realized. It therefore matters nothing in the sense of our contention whether the injury has accrued or may accrue in a measurable sum. It is enough, it seems to us, that we have shown the right is a valuable one and that it is infringed by the law in question.

Point II.

The Alleged Public Evil for the Remedy of Which the Legislation Was Adopted Is Affirmatively and Conclusively Established in This Record and the Point Is Not Left for Conjecture or Surmise.

We have proceeded with the utmost care to reach a point where this court might be persuaded to squarely determine whether this statute deprives our client of its property without due process or denies to appellant the right, incident to ownership, to dispose of its property by the specific contract of sale set forth in the pleadings.

We may assume that this legislation which purports to deny that right of contract is a valid exercise of the police power provided there is, within the law, a reasonable object of public benefit and that the legislative method of attaining that object is appropriate and reasonable.

However, in presenting this phase of our case, we observe certain statements of this Honorable Court which seem to suggest a rule of procedure. It is a rule which seems to be calculated to make the presumption of validity of the law irrebuttable except by affirmative proof of disputable facts.

Stated just as it has been in certain cases the rule might be applied to this case as a result of our own delinquency in exposition. But if our understanding of our record is no less complete than our effort to heed all the decisions of this

court, we can safely say that an adverse application of this rule to our showing would be inappropriate.

At the possible cost of merely revealing our own misconception of the meaning and application of judicial language we ask the privilege of setting forth our own interpretation and to urge that, taking the court's meaning in the extreme of adverse effect, we have, nevertheless, a record which seems to us to justify a square answer to the question:

Is the law reasonable on a full showing that is now before the court?

In *O'Gorman & Young vs. Hartford Fire Ins. Co.* (Jan. 5, 1931), 282 U. S. 251, 75 L. Ed. 324, 328, it was stated:

> "As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. * * * The record is barren of any allegation of fact tending to show unreasonableness."

Our own anxiety to fully heed and understand what the court thus wrote is not lessened by the fact that it is the dissenting opinion which contains the statement (75 L. Ed. 332) that:

> "It cannot rightly be said that the burden of establishing any underlying disputable fact rests upon the appellant before it can successfully challenge the validity of the questioned enactment. This is not a proceeding to enjoin enforcement of a statute because of alleged discrimination or other circumstances, the existence of which requires consideration of facts not known to the court."

And in *Hardware Dealers Mut. F. Ins. Co. vs. Glidden*

(Nov. 23, 1931), ... U. S. ..., 76 L. Ed. (Adv. Sheets) 65, 67, it was said:

> "The records and briefs present no facts disclosing the reasons for the enactment of the present legislation or the effects of its operation * * *. We cannot assume that the Minnesota legislature did not have knowledge of conditions supporting its judgment that the legislation was in the public interest."

And in *Packer Corporation vs. Utah* (Feb. 23, 1932), ... U. S. ..., 76 L. Ed. (Adv. Sheets) 351, 354, the court, citing the two last mentioned cases, remarked that:

> "No facts are brought to our attention which establish either that the evil aimed at does not exist or that the statutory remedy is inappropriate."

The same theory was carried into the minority opinion in the recent case of *New York State Ice Co. vs. Liebmann* (March 21, 1932), ... U. S. ..., 76 L. Ed (Adv. Sheets) 479, by the statement that:

> "The relevant facts appear, in part, of record. Others are matters of common knowledge to those familiar with the ice business. * * * They show the actual conditions, or the beliefs, on which the legislature acted."

Perhaps there would be no occasion in any event for us to suffer this apprehension. It is not a fear that the court may find this statute constitutional but that, by our own fault, we may fail to sufficiently present the case to render proper a square decision of the issue and make unnecessary a decision of this import: "In the absence of allegation or proof to the contrary it will be presumed that the legislature knew or believed there was a public evil to be remedied or public benefit to be attained and that this law is an appropriate method of bringing about that result."

We have a case here so important that it vitally concerns the integrity and existence of a great industry in a large state and the value of property owned by hundreds of thousands of persons. It is as though all sales, amounting annually to millions, were rendered sales "on approval" by legislative fiat, and farm machinery made *quasi*-contraband. We seek to avoid a failure on our part which may be assigned to a lack of evidence which it is the peculiar duty of the advocate to produce. We appeal to the court to note that it is not humanly possible to produce competent evidence to supplant common knowledge in this case.

If the above rule were applied to this case the effect would seem to be that an insurmountable procedural barrier is erected by the very rule which creates the illusion that it affords a way into court. Though the question pertains to the existence and nature of a public evil we know, of course, that it is not intended that the persons comprising the public may be witnesses; or that legislators and members of legislative committees may be permitted to say what they had in mind; or that a decision of constitutionality can be made one way in one case on proofs adduced and another way in another case on other proofs.

It was known that the question in this case could be raised on the pleadings and it was assumed that a demurrer was sufficient to create the issue of law. We therefore alleged in our answer the facts, or what might seem to be conclusions, as to the invalidity of the act but we pleaded (Tr. 5) that of these facts the defendant waived the right of proof save and except as the allegations were matters of common knowledge. We did so in order that the ruling on demurrer might not be ultimately reversed for the sole reason that the allegations of the answer were subject to proof by evidence and, therefore, issuable in fact.

Although the demurrer is an admission of the facts alleged in the answer we do not feel that we can reasonably contend that our allegations of invalidity have been conclusively admitted or that findings of the trial judge on debatable facts in one case between two parties may show the law to be unconstitutional while findings of fact in another such case between other parties might establish the validity of the law.

But we do respectfully contend that the evil aimed at is conclusively and affirmatively established. Often in cases under the Fourteenth Amendment this court conjectures that within the legislative purpose this or that reason may have motivated the enactment; that if a good reason may be conceived as a possibility it is enough to support the law. But in this case, if your Honors please, the legislative purpose and the reasons for the law may not rightly be made the subject of surmise, or declared to be a fact unproven. Just as the court may follow the construction placed upon a law by the lower court, we urge that the public purpose and object of a law should be accepted according to the Supreme Court of the state if that purpose is indicated by its decision—especially where the public purpose sought to be attained arises by plain implication from the face of the statute. Indeed the declaration of the state court as to the reasons for the law and the evil sought to be remedied is a part of the construction of the law by that court.

In this case we submit that—

Point III.

The Object of the Legislation Is to Save the Purchaser of the Named Commodities From Financial Loss Brought About by the Purchase of Articles Which Prove Unfit for the Purpose of Purchase, Where the Sale Has Been Induced by Fraud.

We use the term "fraud" in this brief to broadly cover any sort of imposition on the buyer which is remediable according to accepted principles of the law.

In the case of *Bratberg vs. Advance-Rumely Thresher Co.* (N. D.), 238 N. W. 552, 561, the court said:

> "It is well settled that a state may pass laws and police regulations for the prevention of fraud, regulating weights, measures, packages, inspection laws, substitutes, imitations, adulterations, forms of business liable to abuse, etc., but loss occasioned *by fraud* which may be sustained in such business is merely nothing when compared to the *loss which may be sustained by fraud and deceit in the purchase of farm machinery*, in a great agricultural state like North Dakota."

We submit the foregoing as a fair conclusion of the North Dakota Supreme Court that the object of the law was to save the buyer of farm machinery from *fraud*. The statement of the court is obviously intended to represent a matter of common knowledge.

The public interest is in the multiplication of the financial losses inflicted upon the individual buyers.

The public evil was not the financial harm or loss caused by the sale of unfit commodities. The evil to be remedied was the harm or damage caused by the *fraudulent* sale of unfit articles.

Before any legal test of validity can be applied to this statute its object must be agreed upon. The purpose of the law must be seen before the reasonableness of the remedy may be considered. Either the law was intended (1) to protect every buyer from loss on account of the purchase of machinery proving unfit for the purpose of purchase or (2) to protect that buyer from loss caused by the fraudulent sale of such articles.

If the first view (1) were taken we would have to look upon the statute as the arbitrary imposition by the legislature of a requirement of quality upon the sale of these, and only these, commodities— a measure of quality neither specified by statute nor by regulatory commission but a sort of standard to be found by a jury, after sale, within the vague contours of a buyer's purpose in buying. But the measure of quality would not be standard. It would vary in each case according to the intention and the personal and peculiar plans of the buyer. This, we will discuss under Point V.

But we confidently maintain that the foregoing was not the actual and real object of the law; that the North Dakota Supreme Court has conclusively found (2) that *fraud* was the evil to be remedied; that the financial injury to the buyer caused by fraud was to be prevented.

The sale of an article which turns out to be unfit for the purpose of purchase is not a fraud although proof of the unfitness might be lawfully made *prima facie* evidence of fraud. But a legislative declaration or implication that the fact of unfitness is conclusive or irrebuttable evidence of fraudulent sale is untenable, unreasonable, and unconstitutional where, as in this case, such a conclusion, by legislative fiat, would deprive the seller of a right to establish the truth that there was no fraud; or where the result is to convict and penalize a person for a wrong of which he is blameless.

Heiner vs. Donnan, ... U. S. ..., 76 L. Ed. (Adv. Sheets) 501, 505.

Schlesinger vs. Wisconsin, 270 U. S. 230, 70 L. Ed. 557, 43 A. L. R. 1224.

Mobile, etc., Co. vs. Turnispeed, 219 U. S. 35, 43, 55 L. Ed. 78, 80.

There should be no remediable wrong or damage to a person who, competent to contract in equality with another, acquires exactly that for which he bargains at the price he is willing to pay and subject to a risk he is willing to assume.

In this case a dealer in the sales of the certain commodities, of which this is one, bought the machine for his personal use. He was presumably buying in absolute equality with the seller, and he now alleges no deception, mistake, or imposition upon him. He is seeking to be relieved from a transaction in which he took the benefit of a reduced sales price as a consideration for his open contract to waive all warranties and remedies for breach thereof.

He invokes this statute in defiance of his contract. If that statute was written to protect him from fraud, it follows that he has been given a remedy for fraud where no fraud existed.

Let us take a farmer owning a second-hand machine. It is approaching mechanical disintegration and the farmer wants a new machine. His neighbor offers to give him a note for the machine "just as it is." The parties fully understand the mechanical condition of the machine and that the object of the purchase is to thresh grain with it. But the purchaser considers that he is going to risk little in the investment and knows full well that the machine might not turn out in its present condition as fit to thresh grain. He has used such machinery and personally considers that, if the machine

won't work, he may be able to repair or adjust or reconstruct it and thereby, perhaps, make it work to his satisfaction. Or we may vary the hypothesis to the point that the owner declares the machine will not thresh grain and never can be made to thresh grain and that the buyer puts his own judgment up against this information and is fully willing to execute his offer to buy without warranty.

To the question whether this law was intended to allow a buyer to repudiate and rescind because it turned out that the machine was unfit to thresh grain, reason must answer "No."

Although the above transaction of sale and purchase may be premised in respect of a new machine on the dealer's sale floor—a machine of new and untried construction, or a machine known to be somehow defective—a further word concerning second-hand commodities may be of interest. There may be a question whether the implied warranty of the Uniform Sales Law is applicable to second-hand or used machines. But the law under discussion does not create a warranty limited to the implied warranty of the sales law. It expressly declares no warranty. But the remedy of rescission is made applicable to the purchase by any person of "any gas or oil burning tractor," etc. And Justice Birdzell treats that statute (Tr., p. 20) as applicable to used machines.

And in the case of *Advance-Rumely Thresh. Co. vs. Johnson* (Aug. 20, 1932), ...N. D....., 243 N. W....., a rescission was made of the purchase of a machine which was second-hand and had been in use for six years when sold to defendant. The trial court's instructions against the objections of the seller, declared that Chap. 238, Laws 1919, was applicable notwithstanding that the machine was a second-hand separator which was not one manufactured by

the plaintiff company but was manufactured by another company. Although the fact is not completely shown by the opinion the trial court squarely applied the statute to the purchase of this old and second-hand separator and the Supreme Court expressly approved the instructions. Hence, the statutory declaration of the remedy of rescission creates, by implication, the benefits of a warranty of fitness on the sale of old as well as new machines.

It is also to be observed that Chap. 238, Laws 1919, does not require that the seller have knowledge of the buyer's purpose in buying nor that the buyer rely on the skill or judgment of the seller, as in the case of the statutory warranty. This fact alone would condemn the law as unconstitutional. But we expressly make no point of this legislative omission. We have not come so far to merely enforce amendments.

Thus far we have dealt with the actual object of the law, the actual evil to be remedied, and we submit that:

(1) The object of the law should be declared and decided in accordance with the established fact.

(2) The fact is established by the decisions of the North Dakota Supreme Court.

(3) The deductions of reason from obvious facts may not be excluded however lacking in other evidence.

(4) There could be no reasonable object in a legislative attempt to protect competent buyers against their own contracts fairly and deliberately made without imposition of fraud or injury which is remediable *in a procedural way* according to accepted principles. There is no possibility of a rational basis for the assumption that the legislature intended such a result. The contrary is therefore established that the legislative object was to protect the buyer from some

kind of fraud or from a loss which the principles of civil procedure treat as remediable.

The legislative remedy is the declaration of a court remedy —a peculiar and most important circumstance. Having thus pointed out the public evil aimed at, the purpose of the law, we turn to the remedy to consider how reasonable and appropriate it may be. Attenuated as this argument may be, it is made necessary to show "that the evil aimed at does not exist." But first—if there is a real or artificial fraud to be cured—we contend that:

Point IV.

The Statutory Remedy for the Public Evil Is Inappropriate, Arbitrary and Unreasonable.

To remedy the evil which has been defined, the state, by this law, does not attempt to regulate or supervise the sales; it does not attempt to prohibit sales of unfit articles.

To repeat: The *legislative* remedy for the public evil is the granting of a *court* remedy to the purchaser who, after purchase, finds that the article is not fit.

For the purpose of this discussion, rescission is a right, incident to a contract of purchase, which may be enforced in court—by suit for rescission or defense of rescission. It is a remedy of the law of civil procedure. In this most unusual of situations, where we deal with the object and purpose of a law, and the alleged public evil, and the remedy for the public wrong, these factors must be examined *in the light of procedural law as well as substantive law.* Accepted and established principles in both fields of jurisprudence become germane.

The statute creates (or assumes the existence of that which otherwise by law exists, viz.) this remedy of rescission in

the buyer, and it forbids any contract by way of waiver of or restriction upon the remedy so expressed.

Instead of treating the sale of an individual article of the kind described as a wrong adversely affecting the public interest—to be prohibited, regulated or penalized in the ordinary way—the statute contemplates that the sale can be and lawfully may be made.

The statute takes up the transaction of the parties at the point where, a sale having been made and a test completed, the article proves unfit.

And the legislative mode of dealing with the subject, at that point, is (1) to create or express a remedy in the individual buyer which he may assert by way of a cause of action or defense and (2) to declare that neither the buyer nor the seller may bargain away or waive his right to this remedy.

But the procedural remedy thus given the buyer bears no relation whatever to the particular evil at which the statute is said by the state court to be aimed.

On the contrary, this statute applies the right of rescission to the sale *simply because the article proves unfit.* That is the single, basic, factual circumstance which must exist—the unfitness of the article.

Thus every sale is affected without regard to whom or from whom or under what circumstances the sale occurs, if the article proves to be unfit.

And all of these sales are affected, not by public prohibition or prevention but, by imposing upon the buyer and seller certain terms of contract which they must accept.

While thus condemning every sale of either of these articles by anyone to anyone in the state of North Dakota, the statute does not even purport to remotely touch upon the

particular sales or class of sales which it was, admittedly, intended to impeach.

The legislature by its fiat has attempted to create a conclusive and irrebuttable presumption of fact (namely, the existence of fraud) *from the existence of another fact* (namely, the unfitness of the article) *when there is no rational relation between the fact and the presumption.*

Between the fact of fitness and the question of fraud the particular contract of the parties and the circumstances of the sale must inevitably intervene. If that contract contained a waiver of the implied warranty of fitness (and, therefore, a waiver of the remedy for its breach), and if that contract was intelligently made by a person with capacity to contract, there was no fraud.

Whether there was fraud depends and must depend upon the existence of those elements, well recognized in law, which constitute fraud; the first and indisputable element being that the buyer was led to do something he would not have done had he been apprised of the true facts.

The police power of the state cannot well be said to have been exercised to correct evils in the nature of fraud upon the public unless there is actual fraud to be complained of—a substantial breach of duty. On the other hand there can be no real breach of duty in an absolutely honest transaction.

By the terms of the contract admitted in the instant case the purchaser was a dealer in the very commodities, of which the article purchased was one. It is a fair inference that the purchaser was in no position to be victimized and this purchaser contracted to waive all warranties and remedies for their breach in express consideration of a reduction of the purchase price.

As applied to the countless instances of sale where the article may prove unfit to meet the particular and peculiar purposes of the buyer and where, nevertheless, there was no fraud in a waiver of warranties, this statute is a misconceived and misdirected remedy. In short, we contend that:

An act of the legislature which gives to a buyer of a commodity the full financial benefit of a *procedural remedy for* fraud, in the sale thereof, *where there was no fraud*—an act of the legislature which takes from the seller the cost of this financial gratuity to the buyer—is a clear violation of the Fourteenth Amendment which inhibits the taking of one's property without due process of law.

There can be no intelligent attempt to find, in the statute, a rational purpose unless it be argued that the sale of an unfit article is, presumptively, a fraud. But if that proposition be admitted, arguendo, still it remains apparent that the sale of an unfit article cannot be rationally made *a conclusive or irrefutable presumption of fraud.*

By the circumstances of this case the appellee, asserting this statute and this legislative purpose, as a foundation for his claim, must say that he has been imposed upon; while the appellant, brought into court, is forbidden to show the absence of unfair dealing.

As for fraud, there is and always has been the remedy of rescission of any contract on account of fraud.

A party to a contract is allowed to rescind:

> "If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake or obtained through duress, menace, fraud or undue influence exercised by or with the connivance of the party as to whom he rescinds, or of any other party

to the contract jointly interested with such party."
C. L. N. D., Sec. 5934.

"The rescission of a written contract may be adjudicated on the application of a party aggrieved: (1) In any of the cases mentioned in Section 5934."
C. L. N. D., Sec. 7206.

These statutes, sweeping within their meaning all the law of fraud and of contracts, would afford a remedy of rescission even where the article sold was in every way fit for the purpose of the purchase. The buyer could have been deceived by representations that the selling price was to increase; that no more of the articles would be manufactured; or by any kind of deceit which misled him in the purchase of a perfectly fit commodity.

At the very least the statutes last cited, and the jurisdiction of equity vested in the court, include an undeniable right in the buyer to rescind *where the written contract for the waiver of the implied warranty of fitness was procured by fraud.*

As we have shown, the statute in question takes up the situation only where the implied warranty of fitness has been waived or restricted by contract. Without such contract the buyer has all the rights granted by the new statute. Therefore, to reach those cases where the waiver of the implied warranty has been brought about by fraud, the statute strikes down every contract which purports to waive or restrict the implied warranty of fitness.

If, for the purpose of providing a procedural remedy (which is all this statute purports to do), it were difficult to reach the instances of fraud and to segregate them from honest transactions—if it were impossible to distinguish the guilty from the innocent—it might be argued that the sweep-

ing character of this remedial reform was made reasonable, in the public interest, by the exigency of the situation.

In the case of *Schlesinger vs. Wisconsin*, 270 U. S. 230, 70 L. Ed. 557, 43 A. L. R. 1224, 1227, this court dealt with a statute which fixed a tax upon gifts made in contemplation of death and made the fact of transfer within six years of death a conclusive presumption that the gift was in contemplation of death. It was argued that the law was made necessary to prevent evasion of taxes. Referring to this theory Your Honors say:

> "That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the state readily to collect lawful charges against 'B.' Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The state is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."
>
> See also *Heiner vs. Donnan*, ... U. S. ...., 76 L. Ed. Adv. Sheets 501.

Contending that this rule is pertinent here, we also refer to a statement in the dissenting opinion of *Schlesinger vs. Wisconsin, supra*, as follows:

> "Of course many gifts will be hit by the tax that were made with no contemplation of death. But the law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured."

The same proposition has been at other times and not infrequently expressed. But we do not understand that this constitutional theory admits of a penumbra which is unnecessary to accomplish the legislative purpose. Respectfully we contend that if we have the right of contract under

the Constitution, it should not be eclipsed by the police power without good reason. Stated otherwise we respectfully contend:

That a method of reaching any given end in the interests of one group or class of persons may be considered appropriate and reasonable only when it avoids arbitrary and unjust results which are wholly unnecessary to inflict upon others to attain that end.

We submit to this honorable court that however easy or necessary it may be to indulge every presumption of fact in favor of the validity of the statute, the presumption cannot stand against matters of law of which the court must take judicial notice. Matters of common knowledge and of judicial knowledge are of the record as we understand and if reality, undeniable, can be discovered by process of rational intellection, that reality may not be ignored.

If fraud or unconscionable dealing is the harm to be overcome; if *procedural means* shall be taken as the accepted manner of cure; the remedy ought to be limited to the particular injury unless there is no other reasonable way of effecting a cure. And on this appeal, it should be taken as a matter of judicial knowledge that one who is *injured by fraud* in the sale of articles unfit for the purpose of purchase has a full and adequate remedy in rescission for *fraud* without the grant of the same remedy *for some other reason of fact.*

In this field of legislation there is no occasion for imposing an unjust burden or a loss upon anyone to accomplish relief for another; no need of invalidating every sale, of articles which prove unfit, in the interest of those who are defrauded by the purchase of such articles, or defrauded into the execution of a waiver of the warranty of fitness.

Section 2 of the act, if reasonably written, to express

the admitted purpose of legislation, would have read to this effect: When the consent, of the buyer, to an express waiver or restriction of the implied or statutory warranty of fitness, is obtained by fraud the buyer shall have the same remedy as if the waiver had not been made.

If the difficulties of the buyer, as described in the majority opinion below, are examined it will be made very clear that the harm suffered by the buyer was in his own failure to preserve an appropriate warranty in the contract. As for his right to make a test of the machinery and the necessity of his giving only reasonable notice of defects, it is admitted the law validly accomplishes this purpose—if there is an express warranty in the contract, or if the implied warranty has not been waived. That being true the only reasonable and appropriate legislation would be in the nature of some rule which would make more certain *that he knew what he was signing.* Thus the certificate of a notary might be required to show that the buyer acknowledged he had read the contract. Or the provisions with respect to warranty might be required to be placed in large type. Or he might be required to execute a receipt for copy of the contract as in the case of the execution of chattel mortgages under the law of South Dakota. In the last named state a chattel mortgage is void between the parties for lack of such receipt.

South Dakota Revised Codes, 1919, Sections 1578, 1579.

A severe but accurate test of our contention may be made by attempting the application, to this case, of a paraphrase of the language of this court in *Hardware Dealers Mutual Fire Ins. Co. vs. Glidden Co., supra.* Thus, suppose counsel were to argue as follows:

> "We cannot assume that the North Dakota legislature did not have knowledge of conditions supporting

its judgment that the legislation was in the public interest, and it is enough that, when the statute is read in the light of circumstances generally known to attend the sale of farm machinery, the possibility of a rational basis for the legislative judgment is not excluded."

We would then prayerfully ask this court to observe that:

(1) We are not denying that the legislation was aimed at a public evil. In this behalf the following matters of fact are established by the decision of the North Dakota Supreme Court, either in specific language, or in irresistible deductions from that language, namely:

(a) The public evil arises from fraudulent sales of farm machinery;

(b) The injury to the public on account of fraudulent sales of either commodity is the harm done to a large number of citizens each of whom has made, or may make, a purchase under the inducement of fraud. The public injury is in the multiplication of the injuries inflicted on individual buyers.

(c) The harm to the individual buyer is a *financial loss*, nothing more. There is nothing of public health, morals or safety involved.

(2) The exact nature of the public interest being thus made certain, the only other material fact involved in this inquiry is whether the legislative judgment is supported by rational possibility, i. e., whether the remedy created is appropriate and reasonable. As to this, we point out that:

(a) An unwaivable procedural court remedy of rescission for breach of the implied warranty of fitness, on sale, is not an appropriate remedy for fraud in the sale. *It permits recovery when there is no fraud whatever; while the*

most comprehensive proof of fraud would not invoke this statutory remedy or sustain recovery.

(b) An unwaivable procedural court remedy for fraud which affords no relief *on account of fraud* but which, on the contrary, takes something of value from those who do not participate in any fraud, and bestows the same on those who suffer no loss, *on account of fraud*, is utterly unreasonable, arbitrary and irrational.

Someone, here, has utilized the legislative machinery to construct a deadly weapon to be used against those who are guilty of fraudulent impositions upon purchasers of farm machinery. But instead of directing its aim toward the exact target, disclosed by decisions of the Supreme Court, the legislative act brings destruction *only* to neutrals and non-combatants because without the statute the wrongdoer may be reached.

It is a striking circumstance, as we have shown, that in the reported cases under this act dealers or former dealers in farm machinery or stockholders in dealer corporations have invoked this statutory remedy and in no one of the cases has the donee of this legislative beneficence alleged or offered any proof of fraud either in the sale or in procuring his execution to a waiver of the warranty of fitness or the substitution of a restricted warranty in lieu of the implied warranty.

Even in the last case upon this subject (*International Harvester Co. vs. Olson*, 243 N. W. 248, April 23, 1932) the opinion shows that:

> "The defendant is a farmer, experienced in the handling of machinery, and at one time was engaged in the business of selling farm machinery."

While we are dealing with the contention that the remedy

of the statute is inappropriate it should be ever borne in mind that the object of the law is, somehow, to benefit and protect the hundreds of thousands of farmers in North Dakota who own and annually buy these commodities. By each sale, which may become a finality, the burden of the statute, which is first imposed upon the dealer, is carried to the farmer who has made the purchase. Such buyers seldom use the commodities until they have lost their original usefulness. Annually in the spring and fall, thousands of tenants have auction sales. The countryside is almost covered with the hand bills, at certain seasons of the year. Or the farmer sells or trades the machinery to his neighbor. Or, as a more common occurrence, the farmer turns in the old machine as a part payment on his purchase of a new machine. Under any of these circumstances, and especially in the last mentioned instance, the value of the sale or trade to the owner, is impaired for reasons shown in this brief. And, especially, when the dealer takes in the old machine, on a sale of a new machine, he must make an allowance for the old machine which is controlled by the fact that, on resale of the old machine, it must be sold with a warranty.

Whether this law is valid has not been finally determined. But the natural and inevitable and proximate result of the statute, if found to be constitutional, will be that the selling price of new commodities will be increased to meet the losses caused by this statute.

Most losses are caused by buyers who are unwilling to cooperate with the seller (through ignorance or emotion) and who unreasonably turn the statute into an instrument of profit or a means of avoiding a just debt. Thus the reasonable farmer who wants to be fair will pay the cost of benefits seized by others.

Conceived as an experiment in government and economics,

for the benefit of farmers as a class, the inevitable consequence of the legislation, if found to be valid, will be a loss borne by the authors of the experiment. Sales on credit (which have been usual) will be curtailed or abandoned because the buyer who has not paid is the buyer who will not forego the benefit of refusing payment. Only the most intelligent, reliable, and fair-minded buyer will be able to buy at any price. The more questionable the personal characteristics of the buyer the more likely he will be to claim a rescission, or threaten rescission, and the more likely he will be disposed to strongly support his claims in court.

Already certain large distributors have greatly curtailed their operations in certain counties where the economic and psychological conditions have rendered the business particularly hazardous. Paper, formerly taken, of the face value of millions of dollars is now treated as questionable and collections are no longer the assertion of the creditor's right but, rather, a consideration of the buyer's state of mind. In the case of *Gulf Colorado, etc., Ry. Co. vs. Ellis*, 165 U. S. 150, 41 L. Ed. 666, this court observed that railroad companies "cannot appeal to the courts as other litigants under like conditions and with like protection." Common knowledge and the facts shown in reported decisions indicate that this observation is not without a relevant application in this case.

Point V.

If the Legislative Object Were Taken to Be That Every Buyer of an Article of the Described Class Should Have the Right to Rescind if the Article Is Unfit, Regardless of the Absence of Fraud or the Terms of His Express Contract, the Law Is Discriminatory, Unreasonable and Void.

We have thus far taken the single specific object of the law which, we think, may be said to be reasonable and we have contended that the remedy is inappropriate and unreasonable. We have shown that in the process of curing fraud a remedy of rescission, which otherwise exists for fraud, is merely extended in its application to situations which involve no fraud whatever. Thus a blaze is started to destroy the underbrush in one region but it wipes out the forest in another direction.

But it may be said in effect that the fact known to the legislature was that many persons suffer loss through the purchase of commodities which turn out to be unfit for the purpose of purchase and that the legislative purpose was to grant to every such buyer a right of rescission regardless of whether he has been deceived or imposed upon as a matter of fact or not.

And, perhaps, this theory is given support by the language of the majority opinion (Tr., p. 15) which points out (1) that the buyer is usually given no opportunity to inspect the machines; that (2) contracts of sale usually restrict the liability of warranty of the seller; that (3) farm machinery can only be tested in the proper season and it is necessary to have machinery which will work without delay; that (4) the form of warranty usually required an unreasonable

notice to be given by the buyer; that (5) much of the machinery sold in large quantities was experimental in character and, finally (6) that:

> "In numerous cases the purchasers, on account of provisions in the sales contracts of the nature alluded to above, were required to pay for machinery that was wholly useless. In many instances farmers who purchased such machinery lost their farms as a result of the financial obligations assumed by them under the contracts."

In so far as this statute gives to a buyer, under express or implied warranty, the right (1) of inspection and requires him (4) to give only reasonable notice of rescission, we make no objection. That was the exact object of the old statute (Compiled Laws, Sections 5991, 5992, Tr., p. 18, *supra*). That seems to be the exact purpose and the limit of the purpose of the statute now under discussion according to Justice Birdzell (Tr., p. 18).

But, in the view we are now taking of the law, it does not merely "obviate the effect of harsh contract stipulations prejudicial to the full *enjoyment of* ordinary *legal remedies* for breaches of warranties actually made" or breaches of implied warranties which have not been waived. Nor does the statute merely declare what shall be the substantial contract rights or remedies of the buyer where the express contract is silent.

It flatly declares as void and against public policy any and every contract made by any buyer of either commodity, under any circumstances, by which he may have waived the implied warranty of fitness or agreed to some restricted form of warranty in its place. As so viewed the statute does not differ in principle from a law which might fix the selling

prices of these commodities. As so viewed the statute is clearly subject to the condemnation of a rule frequently stated by this court. We shall quote that rule from two decisions, only—from the majority opinion in *Adkins vs. Children's Hospital*, 261 U. S. 525, 67 L. Ed. 785, 24 A. L. R. 1238, 43 S. Ct. 394, and from the dissenting opinion in *O'Gorman & Young vs. Hartford Ins. Co.*, 282 U. S. 251, 75 L. Ed. 324, 333.

In so doing we shall point out to your Honors that the reasons for the dissenting opinion in the first named case do not here exist; and that the reasons for arriving at the majority view expressed in the last named case do not here exist, and that the method of reaching the conclusion there expressed is not fairly appropriate in the instant case.

In *Adkins vs. Children's Hospital, supra*, 261 U. S. 525, 67 L. Ed. 785, 24 A. L. R. 1245, this court said:

> "The statute now under consideration is attacked upon the ground that it authorizes an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the 5th Amendment. That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause is settled by the decisions of this court, and is no longer open to question. *Allgeyer vs. Louisiana*, 165 U. S. 578, 591, 41 L. Ed. 832, 836, 17 Sup. Ct. Rep. 427; *New York L. Ins. Co. vs. Dodge*, 246 U. S. 357, 373, 374, 62 L. Ed. 772, 781, 782, 38 Sup. Ct. Rep. 337, Ann. Cas. 1918C, 593; *Coppage vs. Kansas*, 236 U. S. 1, 10, 14, 59 L. Ed. 441, 444, 446, L. R. A. 1915C, 960, 35 Sup. Ct. Rep. 40; *Adair vs. United States*, 208 U. S. 161, 52 L. Ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *Cochner vs. New York*, 198 U. S. 45, 49 L. Ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas.

1133; *Butchers' Union S. H. & L. S. L. Co. vs. Crescent City L. S. L. & S. H. Co.*, 111 U. S. 746, 28 L. Ed. 585, 4 Sup. Ct. Rep. 652; *Muller vs. Oregon*, 208 U. S. 412, 421, 52 L. Ed. 551, 555, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957. * * * In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining."

And in the above mentioned decision the court quoted from *Coppage vs. U. S., supra*, that:

"An interference with its liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary unless it be supportable as a reasonable exercise of the police power of the state."

By the foregoing rule the minimum wage law, as applied to either men or women *sui juris*, was held void. In the dissenting opinion of Justice Taft (261 U. S. 525, 67 L. Ed. 785, 798, 24 A. L. R. 1254) reference was made to the fact that:

"Legislatures in limiting freedom of contract between employee and employer by a minimum wage, proceed on the assumption that employees in the class receiving least pay are not upon a full level of equality of choice with their employer and in their necessitous circumstances are prone to accept pretty much anything that is offered. They are peculiarly subject to the overreaching of the harsh and greedy employer. The evils of the sweat system and of the long hours and low wages which are characteristic of it are well known."

And Justice Holmes, dissenting (261 U. S. 525, 67 L. Ed.

785, 800, 24 A. L. R. 1257) referred to the effect of the wage law thus:

> "The end—to remove conditions leading to ill health, immorality, and the deterioration of the race—no one would deny to be within the scope of constitutional legislation."

Assuming that the laboring class, by reason of the poverty common to millions of its members, is subject to the greed and rapacity of the employer in the nature of things; that all society may have a paramount concern as to the health, morality and physical integrity of so large a group, no such impelling reasons for this warranty law exist.

The idea is too preposterous for mention that there is some coercion of natural or economic circumstance which may compel the buyer to surrender the privilege of buying on terms of his own approval, in the field of a trade commonly known to be characterized by the sharpest competition. Considering, as a matter of common knowledge, that a North Dakota legislature is comprised of the class for whose benefit this act was adopted, the law itself is proof, in a way, that the quality of shrewdness, traditional of farmers, has not disappeared in the passing of time. Dressed in a repetition of the word "reasonable" the statute is, superficially reasonable. It is so adroitly framed that it requires delving far below the surface to expose its object and unconstitutional effect. With the appearance of preserving to appellant the very essence of due process, i. e., the right to defend and prove that an article is fit for the purpose of purchase, it actually opens the doors to imposition and fraud on the seller and places the seller at the absolute mercy of the buyer. When it comes to collection the right of rescission is a threat to which the seller must be responsive and obe-

dient; or the right may be exercised to the expense or loss of the seller.

If it were conjectured as a possible foundation for this act that a large body of the citizens of a great state—the farmers—is wantonly and wrongfully dominated by the imposition of certain terms of sales contracts to which the buyers must accede or go without, what is to prevent the same fallacy from supporting an act to control the prices of these identical commodities, seggregated from other common commodities? And, after that, where is the pause in transition from the Republican form of government contemplated by the Constitution to some other form of government?

Whether the law prevents parties from making a warranty conformable to the circumstances of both parties or prevents them from fixing the consideration of the trade, the identical principle is involved. Every living man knows that he binds himself by what he signs, or, if he is incapable of that knowledge, the law affords him adequate relief.

To make applicable to this case the theory of the dissenting opinions in *Adkins vs. Children's Hospital, supra,* some great inferiority or subserviency of the buying public to the seller of farm machinery must be fabricated. That subserviency could not suggest the buyer of farm machinery as going hungry or jobless if he did not accept the terms dictated by the seller. No matter of the destruction of health, morals, safety or stability of the purchasing public can be brought forward.

The difference in position, if any, must be the result of comparative intelligence tests. And we take it as unnecessary to suggest that the time has not yet arrived when a generation of farmer pioneers and their sons need be sympathetically classified by this court as so peculiarly dumb and insensible that they do not know a contract is a contract

and that no one can compel them to sign if they do not choose to sign.

Neither by legislative fiat nor the misconception of advocacy may it be sensibly said that there is any inequality whatever between the buyers of these commodities and the sellers which may stand against the right and the ability of the buyers to contract only as they are willing to contract.

But there is an intimation in the opinion below that much of the machinery described in the act "was wholly experimental in character." If that is correct no justification arises for the classification of all sellers of "gas or oil burning tractors, gas or steam engines, harvesting or threshing machinery" as vendors of novel and experimental devices.

Further, suppose some machines are new and untried, who possibly can know better of their novelty and experimental character than buyers of those common, ordinary, standard machines which they and their fathers have used for generations? No inequality of position can be created out of the fact of newness or novelty in the device. If the farmer buys a new kind of machine it is because he is willing to chance its possible imperfections against those possible benefits of increased production and that possible convenience in operation which influenced the invention. This statute, as observed by Justice Birdzell (Tr., p. 21):

> "Has the effect, as to machines subsequently invented or coming into use, of preventing the parties to a sale from contracting with respect to the risk of operation and adaptability, although the novelty be known to both buyer and seller and the elements of uncertainty be equally appreciated and although there be no overreaching whatsoever."

It is declared in the majority opinion (Tr., p. 15) that:

"Of course, tractors, harvesting and threshing machinery could be tested only during the proper season, that is, harvesting machinery could be tested only during the harvesting season and threshing machines could be tested only during the threshing season. It was of vital importance to the people of the state that farm machinery should be fit for the purpose for which it was sold. If it failed to work and other machinery must be obtained it was essential that the purchaser should be in position to do so at once as the delay of only a few days might result in the loss of the entire crop."

In ascertaining the class of persons who are intended to be affected by the act, let us consider the real extent of this need for the testing of certain machinery at a certain time.

We take the farming operation from its inception. The ground must be plowed, in the fall or spring, and then, perhaps, dragged or disced. There is nothing about a plow or disc or harrow which can measure up to the novelty of invention, intricacy of device, or defects of manufacture, which may work out to the loss of the farmer's crop and thence to the loss of his home. Simple machinery for planting and cultivation of the crop being admittedly available with ample time for trial, the ripened crop is brought into existence.

It is at this point, if at any time, that the farmer must wear the yoke of subjugation to the implement dealer. Then for the first time, it is thought, he may test out the harvesting machinery that he has assumptively been compelled to buy and, failing to make it operate successfully, he may lose the crop.

Such an idea is without possibility of rational basis. The ordinary harvester machines which are ordinarily used (binders and the like) are so common that the buyer need

not even make selection. The mention of a kind of machine and any one of numerous manufacturers will indicate a commodity which is and for a generation has always been fit for the purpose of purchase.

If a test of harvesting machinery is necessary there are weeks during which the test may be made before the crop need be entirely harvested or harvesting commenced. Nature testifies to this fact for us and the point simply cannot be justly disputed.

The grain being harvested, in shock or stack, there is no imperative necessity for immediate threshing, to save the crop. And, in any event, it is neither necessary nor ordinary that the farmer buy threshing machinery in North Dakota. The threshing can be and customarily is done by hire.

This statute is to protect buyers and it is clear that there is no compulsion on the farmer to buy any threshing machinery whatever. He has planted, raised, and harvested the crop without the need of any haste born of the fear that he must buy an article the unfitness of which may cause the loss of his crop. There exists no compulsion so great that he must waive the warranty of fitness and run the risk of experimental apparatus. This point is of great importance. The police power may be properly invoked only in the interests of the public generally or the community at large. Harvesting machinery is commonly purchased by all farmers. But threshing machinery is not purchased and need not be purchased by any substantial proportion of the public. A thresher is not necessarily a farmer; the business of threshing crops is not the business of farming. The interests of the thresher, as the person benefited by this law, cannot rightly be superimposed upon the interests of the farmer. So far as farmers are concerned—and they are the public generally—there is absolutely no occasion for them to place

themselves in a way to require this statute to protect them in the matter of defective threshing machinery. They need not buy at all and they are not compelled to hire machines that won't work; and when they do hire such machines they pay only for threshing done, by the bushel.

But it may be said the farmer prefers to use a gas or oil burning tractor, or harvesting machinery propelled by a gas, oil, or steam engine. We deal now not with a necessity but with the buyer's preference in the selection of the kind of machine. The fact that it is unnecessary for any farmer to buy any such machine to raise, harvest, and procure the threshing of his crops—the fact that millions of farmers use horse-drawn machinery and that most of them hire the threshing of their crops—should make further discussion unnecessary.

Nevertheless the majority opinion below appears to make substance of the necessity for trial of experimental machinery with the value of the crop placed in jeopardy by faulty construction of the machinery. The plow, the planter and the binder are so simple the court must have had engines in mind. These observations represent the only tangible suggestion that the farmer can be put to a disadvantage which his free right of contract may not avoid. He is pictured as compelled to take a chance when the speculation should be borne by the seller, regardless of the contract which the buyer is willing to make and the fact that the seller is in no manner at fault.

If the farmer wants a gas engine—a tractor—to pull his plows it cannot be ventured that he is without ample time to try out the machine without gambling his crop against the fact of its unfitness. If he wants to use a tractor to pull his harvesting binder, it would be amusing to argue that he cannot try out the tractor before the grain is ripe

and, as for the binder, it is as we have shown a very ordinary machine.

Though we have shown that farmers, generally, are under no compulsion to buy threshing machinery because, as a matter of common knowledge, all of them can and most of them do hire the threshing to be done by machines which do accomplish the job, nevertheless we may take a large portion of the citizens of an agricultural state as purchasers of threshing machinery. All that we have said still applies. A threshing separator is and long has been an ordinary apparatus commonly purchased and successfully operated by ordinary farmers everywhere. It may be propelled by a gas, oil, or steam engine, but the engine may be as common and ordinary as simple engines have been for half a century nor is the situation ordinary which may prevent abundant opportunity for test and trial.

But suppose the farmer wants some extraordinary apparatus or uncommon device, or a thresher-combine—a machine of later construction made to harvest and thresh the grain in a single operation. It is needless to point out that hundreds of thousands of these machines are now in successful operation. They came into extensive use after the adoption of the act and we may assume that the law was written to save the buyer from the untried and experimental characteristics of such machines.

There is a fault in presenting the farmer to this court as ready to go into a field of ripe grain with a new and untested contraption which, by its failure to operate, may cause the loss of his crop. As we have pointed out, he is neither compelled to buy a machine of novel or experimental construction nor, in buying, compelled to waive the warranty of fitness or the right to try out the machine and hand it back if it will not work.

Considering this statute in any possible view, it runs squarely counter with the rule repeated in *Adkins vs. Children's Hospital, supra,* and we submit that the relation of the buyers and sellers of farm machinery is not comparable with the dependency of women or other employees upon their employers mentioned in the dissenting opinion.

But the rule we assert was stated and the decisions we cite were mentioned thus by a minority of the court in *O'Gorman & Young vs. Hartford Fire Ins. Co.,* 282 U. S. 251, 75 L. Ed. 324:

> "This court has steadfastly upheld the general right to enter into private contract and has definitely disapproved attempts to fix prices by legislative fiat. 'Freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances.' 'That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause (of the 14th Amendment) is settled by the decisions of this court and is no longer open to question.' *Adkins vs. Children's Hospital,* 261 U. S. 525, 545, 546, 67 L. Ed. 785, 791, 792, 24 A. L. R. 1238, 43 S. St. 394; *Adair vs. United States,* 208 U. S. 161, 174, 175, 52 L. Ed. 430, 442, 443, 28 S. Ct. 277, 13 Ann. Cas. 764; *Coppage vs. Kansas,* 236 U. S. 1, 14, 59 L. Ed. 441, 446, L. R. A. 1915C, 960, 35 S. Ct. 240; *Wilson vs. New,* 243 U. S. 332, 61 L. Ed. 755, L. R. A. 1917E, 938, 37 S. St. 298, Ann. Cas. 1918A, 1024; *Adams vs. Tanner,* 244 U. S. 590, 61 L. Ed. 1336, L. R. A. 1917F, 1163, 37 S. Ct. 662, Ann. Cas. 1917D, 973; *Truax vs. Corrigan,* 257 U. S. 312, 338, 66 L. Ed. 254, 265, 27 A. L. R. 375, 42 S. Ct. 124; *Meyer vs. Nebraska,* 262 U. S. 390, 67 L. Ed. 1042,

29 A. L. R. 1446, 43 S. Ct. 625; *Chas. Wolff Packing Co. vs. Court of Industrial Relations*, 262 U. S. 522, 67 L. Ed. 1103, 27 A. L. R. 1280, 43 S. Ct. 630; *Tyson & Bro-United Theatre Ticket Office vs. Banton*, 273 U. S. 418, 434, 71 L. Ed. 718, 724, 58 A. L. R. 1236, 47 S. Ct. 426; *Ribnik vs. McBride*, 277 U. S. 350, 72 L. Ed. 913, 56 A. L. R. 1327, 48 S. Ct. 545; *Louis K. Liggett Co. vs. Baldridge*, 278 U. S. 105, 111, 73 L. Ed. 204, 208, 49 S. Ct. 57."

And in that minority opinion it was added that:

"In order to justify the denial of the right to make private contracts some special circumstances sufficient to indicate the necessity thereof must be shown by the party relying upon the denial."

It behooves us therefore to examine with the utmost care the principal opinion in *O'Gorman & Young vs. Hartford Fire Ins. Co.*, and decisions subsequently based thereon, in order that the distinction of those cases from the instant case may be pointed out.

In the case last cited a majority of the court found that the business of insurance is so far affected with a public interest that various regulations have been lawfully imposed upon that business.

For the purpose of argument we shall assume, without conceding, that the business of selling the commodities described in the statute now before the court is so far impressed with a public interest that there is a public concern in preventing or avoiding a certain kind of fraud commonly perpetrated upon the purchasers.

As in the principal opinion of *O'Gorman & Young vs. Hartford Fire Ins. Co.*, let us assume as there stated that:

> "The statute here questioned deals with a subject clearly within the scope of the police power."

But that, it would seem, is as far as the opinion in the last mentioned case may be made applicable, or the statements of the dissenting opinion made inapplicable, to the case at bar. For that case is disposed of on the stated reason that:

> "It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. * * * The record is barren of any allegation of fact tending to show unreasonableness."

And, similarly, in the case of *Hardware Dealers Mut. Fire Ins. Co. vs. Glidden Co.*, ... U. S. ...., 76 L. Ed., ..., Adv. Sheets 67, it was said:

> "The records and briefs present no facts disclosing the reasons for the enactment of the present legislation or the effects of its operation * * *. We cannot assume that the Minnesota legislature did not have knowledge of conditions supporting its judgment that the legislation was in the public interest."

But we have made proof in the instant case. The reasons for the enactment are shown by the decisions of the North Dakota Supreme Court. The law on its face is the simplest possible proof of its object and the assumptive reason for its enactment. There is no form of evidence, sworn or unsworn, verbal or documentary, that can possibly enlighten or make doubtful that which is here self-evident.

The statute creates and makes unwaivable the remedy of rescission by the buyers of certain commodities. Rescission

is a procedural remedy of the law. Such remedies are created for remediable wrongs. The statute applies the remedy to the buyer of an article which proves unfit for the purpose of purchase and it therefore expresses the alleged wrong at which this statute is aimed. To treat the wrong to the individual buyer as a public evil, many buyers may be assumed to purchase articles which prove unfit and, thereby, suffer financial loss.

Thus this record fully and completely and indisputably discloses the reasons for the enactment, the assumed evil to be reached, and all the conditions which may be said to exist to support the legislative judgment that the legislation was in the public interest.

In the very process of that proof and exposition the legislation is shown to be absolutely vicious, discriminatory and outrageous. No intelligent or rational purpose is disclosed except as intelligence may be used by any class which may dominate legislation—in this case the buyers of certain commodities—to utterly destroy and confiscate the constitutional rights of others—in this case the persons or concerns who commonly engage in the business of selling farm machinery.

That even this statement may not be taken as a confession of benefit to the public it should ever be borne in mind that every single article of the several kinds described, which any member of the purchasing class may acquire, must eventually reach a stage where, as it stands, it is unfit for the object of its manufacture and the purpose of its original purchase. At that point the remaining value of the machine in the hands of its owner is impaired or destroyed by the law which makes all further sales or trades subject to rescission.

We say "subject to rescission" in repetition of our point

that the burden of this law and the loss it creates is not limited to the fact that a sale can be effectively rescinded but extends to the fact that the seller's title to the purchase price or right to collect is clouded and impaired. The mere right of the buyer to claim a rescission impairs the value of the commodity or that for which it is exchanged. The contract of sale, as the parties would make it, is property and the value of the contract is destroyed.

The law is unreasonable because it shows the state assuming a paternal intrusion into the private affairs of its citizens, competent to contract, where the sole and only aid or benefit afforded is to relieve them from their contracts intelligently made, and in the making of which no fraud or inequality or imposition or over-reaching of any kind exists.

Point VI.

The Statute Deprives Appellant of the Equal Protection of the Law and Creates a Classification Which Is Discriminatory, Arbitrary and Unreasonable.

The discrimination of this law in favor of a certain part of the class of persons who buy the described commodities is unreasonable and no state of facts can be conceived to sustain it.

We would like to deal with this point in two ways: first, to mention the basis for the discrimination or distinction of class which has been found and adjudicated by the North Dakota Supreme Court and to show that the ground for distinction is without possibility of rational application to this law; and second, to show that no facts may be conceived to sustain the classification expressed.

It has been noted that the opinions of the North Dakota Supreme Court in this and the Bratberg cases purport to

show the reasons in complete detail for the enactment of this legislation and, hence, for the classification of persons affected by the law. The one decision (Bratberg) clearly shows that relief from fraud upon the buyers of these commodities was the aim to be accomplished while the other decision (in the instant case) points out the exact nature of this so-called fraud or imposition on the buyer and the circumstances common in the sale of certain articles which brought about the harm and loss to the buyer.

With this conclusive record and evidence as to the reasons for the law, the description of individuals affected must be examined in the light of the proven legislative purpose and, very especially, in the light of the proven benefit conferred upon this class, viz.: the right to rescind the contract of purchase.

What are these circumstances out of which a public wrong or evil comes into being? The court has found, in brief, that buyers are subjected to financial losses because certain commodities turn out to be unfit. Of course the court took judicial knowledge of the fact that there was a remedy of rescission where the implied warranty of fitness had not been waived or restricted by express contract. But it was pointed out that it was usual and ordinary for contracts to be executed by the buyers which waived this statutory warranty, or all warranties, or substituted some warranty which did not adequately protect the buyer against loss.

The classification of persons thus designated by implication is not distinguishable at all by the character of the commodities purchased but, rather, by the fact that they are persons who occasionally or usually save no sufficient contract rights of warranty to themselves in the act of making a purchase.

The classification described by the court—the only class

of individuals toward which the legislative purpose is thus shown to be directed—is not in any sense the class of persons actually described in the act. The statute creates a class described by the kind of commodity sold. But the act actually affects only those who make a certain kind of contract.

Thus, if persons who negligently or unwisely sign contracts which are not to their best interests are the class intended to be benefited and which is benefited by the act, there is no rational theory for limiting that class to those only who buy these particular commodities; and no reasonable basis for expanding that class to all persons who buy any of these commodities. It is unreasonable and discriminatory to impose the burden of the act on those only who sell such commodities to buyers who do not preserve their right of warranty.

It is true the court refers to the need of testing harvesting machinery in harvesting time and threshing machinery in threshing season. But in so far as this statement alludes to a classification of persons affected by the act, it fails to furnish any rational support for the classification actually made.

In the first place, this need of test within a limited space of time is related by the court only to harvesting and threshing machinery. The necessities of the buyer, thus stated, is not claimed to have reference to gas or oil burning tractors or gas or steam engines.

No one denies that all buyers of all commodities should be given a fair opportunity of test if they are entitled under their contract to the remedy of rescission for the breach of warranty. This law grants nothing more than the right of rescission. It is a procedural remedy and there must first be a substantive right before a remedy for its breach may

be considered. Hence a reference to those who are pressed for time in harvesting and threshing grain has reference to those only who have made a certain kind of contract. Thus, by mention of those whose need is great for threshing and harvesting machinery which is fit, nothing has been added to or taken from the class of persons, only, who have contracted to waive warranties.

In the third place we have demonstrated that the idea is wholly incompatible with common knowledge that any farmer is obliged to test harvesting machinery only in harvest time or under such pressure of events that its unfitness will threaten the loss of his crop. It may be the usual thing to put the new binder into the ripened grain. But this is not necessary. If a trial is desired—if a trial is so important that the preservation of the crop depends upon the fitness of the machine—a trial is quite possible before a danger of losing the crop may come about.

As for threshing machinery, an idea that the crop will be lost if a particular machine or immediate purchase will not successfully operate, cannot be intelligently asserted.

The most that can be imagined from the circumstance that harvesting and threshing machinery is usually tested (not necessarily tested) in the harvesting or threshing season is that purchasers of these articles are put to greater loss or greater inconvenience than buyers of other commodities, when the machines do not prove to be fit. Though this be assumed as a fact the persons so referred to are not the class described in this act.

At this point we call attention to the language of the North Dakota Supreme Court written in 1896 in the case of *Gaar, Scott & Co. vs. Green,* 6 N. D. 48, 53, where it was declared that:

"The improvidence of such a contract as applied to threshing machinery is most glaring. It cannot be tested until the crop is ready for threshing and, once that time arrives, delays are so dangerous and expensive, time is of such importance that the farmer will take great risks on the machinery, rather than cease work. The practical result is that in case of defective machinery the vendors can generally avoid liability on the warranty by reason of some default on the part of the vendee."

But all of that difficulty and harm was traceable to a contract of terms which rendered valueless the *remedy* for breach of warranty. It made a practical test impossible under the circumstances or required a notice of defects which, under the circumstances, could not be reasonably given. And for this evil full relief was given in 1913 by the old statute quoted in our opening statement which provided that, where a warranty of any kind had been made, the buyer should have a reasonable opportunity to test the machine and need give notice of defects only to the person or dealer from whom he made the purchase. That statute having been repealed by the Uniform Sales Law of 1917 this statutory right (incident only to the enjoyment of a remedy) of trial and reasonable notice was gone. The act under discussion was then adopted in 1919 and in so far as it requires a fair and reasonable opportunity for trial and for a notice of defects reasonably given, we make no objection. That was the purpose of the act, according to Justice Birdzell, dissenting below.

That is, if the buyer is entitled to the *substantive right of warranty* by express or implied contract, legislation is reasonable which protects and preserves *the remedy* for its breach. But this statute, in the process of protecting the

buyer's remedy, imports the substantial contract right of warranty into the transaction.

Reference is also made by the North Dakota Supreme Court (Tr., p. 16) to the fact that large quantities of machinery sold, of the kind denominated in the act, was experimental in character. But the class of persons to which the effect of the law *actually applies* are not the buyers of these commodities, merely. They are those buyers of the commodities who, in buying, waive the implied warranty of fitness or fail to preserve a warranty in its place which will adequately protect their interests.

No matter what other distinguishing characteristics of class may be said to appear or to be expressed, the final test of inclusion or exclusion is in the question whether the sales contract was made in a certain way by the buyer and seller.

When the identification of the class benefited (or of the class adversely affected by the law) is so viewed there is no conceivable method of reasonably drawing a distinction between these persons and others who, in countless affairs of life, do not make the best or the most sensible bargain to avoid the losses of trade.

This is "class legislation" as the term is understood by the ordinary man on the street. The concerns or persons who undertake to sell these particular commodities must see to it that the buyer gets his money's worth—whatever that may be in the view of that question which a jury may be pleased to take. And the penalty imposed upon the seller is not alone that he must return the purchase price or cancel the debt if he is in the wrong but he must in all cases hold the money or the evidence of debt always subject to the buyer's privilege to question and cloud his title.

Why should these persons be selected for protection against losses caused by their own carelessness and negli-

gence? Why should the state protect them and only them from their indiscretions? The assertion that contracts as commonly made for the sale of these commodities (and the lower court refers only to harvesting and threshing machinery) fail to provide warranties to the buyers, is but a way of saying that the buyers commonly accept and execute such contracts.

The state thus undertakes to supervise the acts of its citizen by repudiating for him his own engagement, undertaken knowingly, deliberately, and without fraudulent inducement. And the admitted object of this paternal and governmental solicitude is that the citizen shall be saved only from financial loss. If such interference is valid then it follows logically that the state may reject for its citizens the contracts which they may improvidently make and impose the cost of repudiation "on the other party."

Clearly there is no rational basis for this classification. There is no reason for protecting the individual who loses money in buying these commodities while granting no protection to those who suffer loss in making other purchases. There is no justification for imposing the burden of this statute upon those persons, only, who are engaged in the business of selling these commodities or upon those persons who lawfully acquire and have the right to sell either of these commodities.

Nor does the burden of this act apply with like effect to all those who are thus classified. It is a matter of common knowledge that there are many kinds of devices, machines, or apparatuses which answer to the statutory description. It is likewise a matter of common knowledge that thousands of such articles, as sold every year, in the course of ordinary trade in new machines, are of such ordinary simplicity of construction and operation and of such long established

standard of manufacture that no question can be honestly made as to their fitness.

Thousands of tractors and harvesting machines, made by six or more well known manufacturers, are sold by hundreds of local dealers each year in North Dakota. The design, construction, and operation of such machines has become as standard and well known as that of the Model T Ford, the usefulness of which, in spite of its obvious limitations, would never be questioned by its buyer.

But there are others within this class of vendors to whom the statutory right of rescission, in the buyer, will seriously apply as in the case of those who sell articles which are new or novel or less standard in manufacture and common use. As to the latter their commodities are made *quasi*-contraband because their sales are not only subject to rescission but subject to a greater probability of attempted rescission.

In other words, there are vendors of thousands of these articles against whom the exercise of the privilege of rescission is unlikely, while there are others against whom the exercise of this right by the buyer is probable. And this inequality is made evident in the very nature of things by a comparison of commodities of long proven and accepted fitness with commodities of new invention which have not been made to conform to the experience of a generation in trade and operation or by comparison of used with new machines.

For all the reasons stated we respectfully submit that the classification created by the statute is arbitrary and unreasonable and that the act deprives the appellant of a protection of the loss in equality with others similarly situated.

Point VII.

The Business of Selling the Commodities in Question Is Not so Charged With a Public Use or Interest that the Regulation in Question Is Justified.

We now propose to examine this law as a regulation of the business of sales, or a restriction upon the conduct of that business. It prescribes conditions to which the appellant, for instance, must conform to enjoy the benefits of the right and privilege to engage in an ordinary and private business or common calling. In discussing the subject of liberty of contract, *supra,* we have taken the leading case of former pronouncement by this court and have endeavored to show that the rule of that case is applicable here; while we have taken the cases which most nearly approach a contradiction of our position and have distinguished those cases.

With respect to the regulation of business generally and the right of the state to prescribe the conditions under which the business may be conducted, and with respect to what may or may not be a "public business" or a business "charged with a public interest," or a "public use," there would seem to be no useful purpose in citing this court to the numerous decisions which comprise an almost continuous exposition of the subject. Nor is there any virtue in our appearing to be unmindful of the conflicting views which have been expressed.

For our purpose we shall refer only to that latest decision in which all theories in this behalf have been fully expounded.

And we shall endeavor to point out that the invalidity of this statute is made apparent by every process of reasoning, or judicial theory which has been stated.

As declared by the majority of this court in *New State Ice Co. vs. Liebmann*, ... U. S. ...., 76 L. Ed. ...., Adv. Sheets, 483, we contend that:

> "It (the business of selling these commodities) is a business as essentially private in its nature as the business of a grocer, the dairyman, the butcher and baker, the shoemaker or the tailor, each of whom performs a service which, to a greater or less extent, the community is dependent upon and interested in having maintained, but which bears no such relation to the public to warrant its inclusion in the category of businesses charged with a public use."

But with a slight change in the language of the dissenting opinion (... U. S. ..., 76 L. Ed. ..., Adv. Sheets 488) we shall assume that:

> "The function of the court is primarily to determine whether the conditions in North Dakota are such that the legislature could not reasonably conclude (1) that the public welfare required treating the sale of these commodities as a 'public business'; and (2) that in order to insure the inhabitants of the state that they shall not be subjected to financial loss through the purchase of commodities which may prove unfit, it is necessary to impose such a regulation or restriction upon the business that every purchaser shall have the right to rescind his purchase if the commodity proves unfit."

And we shall assume that this court (Id):

> "Cannot properly decide that the legislators acted unreasonably without first ascertaining what was the experience of North Dakota in respect to this business."

As observed by the court in the Liebmann case (Id.):

"The relevant facts appear in part of the record. Others are matters of common knowledge."

The Supreme Court of North Dakota has stated exactly what the trouble was and the law on its face shows the only possible experience of North Dakota which could approach a justification for the law. That experience or public difficulty or public evil can be stated, substantially, in just one or the other of two possible ways.

It may be stated thus:

Individuals who purchased certain commodities, annually sold in large quantities in the state, were frequently or usually put to a financial loss because of their failure to preserve to themselves, in purchase, the implied warranty of fitness created by the Uniform Sales Law, or a substitute form of warranty reasonably suitable and adequate.

Or it may be stated thus:

Individuals who purchased certain commodities, annually sold in large quantities in the state, were frequently or usually put to a financial loss because, in making purchase, their consent to a waiver of implied warranty of fitness, or other reasonable warranty, was procured by fraud.

Everything that has been written and everything that can be imagined must lead ineluctably to a confirmation of the accuracy of the foregoing statement.

It would be inappropriate to say that we have not proven this point; that the matter is open to conjecture or surmise; or that we had failed in any way to meet any burden of proof susceptible to competent adduction.

The law shows for itself the target at which it is apparently aimed, viz., the evil created in the purchase by anyone, from anyone, under any circumstances, of either of these commodities, new or used, which proves to be unfit. While

the Supreme Court of North Dakota has shown explicitly the target at which the law was intended to be aimed, viz., the evil created in the sale of these commodities where the consent of the buyer to a waiver of warranty is obtained by fraud.

And we may take as applicable to this appeal the following language (Id., Adv. Sheets, 496):

> "So far as concerns the power to regulate, there is no difference in essence between a business called private and one called a public utility or said to be 'affected with the public interest.' Whatever the nature of the business, whatever the scope or character of the regulation applied, the source of the power invoked is the same. And likewise the constitutional limitation upon that power. The source is the police power."

Without relinquishing the security of the rules announced in the majority opinion in the Liebmann case, frequently expounded and applied in numerous former decisions of this court, we cling also, and with no less confidence, to the assurance given by the statement of Justice Brandeis (Id., p. 496) in that case, as follows:

> "The limitation is that set by the due process clause which, as construed, requires that the regulation shall be not unreasonable, arbitrary or capricious; and that means of regulation selected shall have a real or substantial relation to the object sought to be obtained."

Respectfully, we submit that this law must fail by application of the formula for the test of constitutionality above stated.

We may thus treat every business or calling, however private in character, as properly subject to regulation under the police power if regulation may "promote the public wel-

fare." No question can be made of the fact that the police power cannot be applied to render the Fourteenth Amendment meaningless. The police power is not a camouflage behind which legislation can be made valid to confiscate the property of a few and devote it to the common enjoyment of the popular or ruling class in government.

Those who sell certain commodities to most of the people in a given state "in large quantities" may be taken by the casual and ordinary observer as the possessors of wealth and, therefore, to have gained some advantage under the law to which they are not justly entitled; while the great numbers of people of moderate means who buy, and who by the power of numbers dominate legislation, are prone to view themselves as rightly entitled to everything they can take to themselves by the exercise of that power.

The theory that might in legislation can make right is constitutional or it is not constitutional. As the theory cannot, of course, be harmonized with the Constitution we have sought with great care to find the extent and limit of this contradiction.

However far the police power may be advanced against the constitutional bulwarks which fairly protect each person's right of property it would seem that the very limits of encroachment are met at the point where the legislation *is affirmatively shown* to be unreasonable, arbitrary and capricious or where the means of regulation of business or of restriction upon the right of property *are affirmatively shown* to have no real or substantial relation to the object sought to be attained.

CONCLUSION.

In this case we have shown that the law is unreasonable (1) because all that the law grants the individual buyer can be preserved to him by his own free act of contract. No law is necessary to compel him to avoid the assumption of a risk of contract which he need not assume. (2) There being no economic or sociological inequality of position between the buyer and seller of these commodities, the law amounts to a paternal and governmental gift arbitrarily exacted from the sellers and conferred upon the buyers. (3) If fraud, *of a kind remediable by the remedies of civil procedure* is assumed to be common in these sales the proposed legislative remedy is inappropriate because the remedy is made applicable in the absence of any fraud or imposition whatever. It is not necessary or appropriate to make all sales rescindable for the reasons stated in the statute in order to make those sales rescindable which are brought about by fraud. (4) In actual and practical effect the law affects *only* those who have not participated in any fraud because the same procedural remedy of rescission otherwise exists as a matter of law where fraud has occurred. (5) The evil at which the law is said to be aimed does not exist. It is an artificial wrong. The imposition on the buyer may be traced to the point where his own act or omission brought about the injury, if any. The statute merely writes a contract for him which he could have demanded in the first instance or refused to purchase. (6) If buyers are supposed to commonly sign contracts without knowledge of their contents, the only appropriate legislation would be in provisions to better insure that the buyers acquire knowledge of the contracts they sign. But the court below has not found this to be the trouble. The court merely shows the evil consequences of contracts knowingly made.

(7) Viewed as a law which is merely intended to require that each commodity sold shall meet the buyer's purpose in purchase the law is wholly without any conceivable justification. There are no reasons in the facts of common knowledge to support the selection and classification of the sellers of these commodities for these restrictions applicable to them alone. There are no reasons to support the inclusion of all such vendors in the statutory classification. (8) The inconvenience or loss which may follow because the contract gives no reasonable opportunity of trial, or requires an unreasonable notice of defects, is fully cured by the statute which preserves the right of trial and requires only reasonable notice—if there is a contract of warranty in fact. (9) In view of the fact that the statute does preserve the right of trial and requires only a reasonable notice of defects—in a case where a warranty exists by contract—it follows that the only persons actually benefited by the statute are those who do not preserve a warranty in their contracts, actually made; and the only class of persons whose rights are restricted by the statute are those who make sales without warranty. The statute therefore *appears* to classify persons who sell certain commodities but the statute *in fact* affects only persons who make contracts in a certain way. (10) The class of persons actually affected by the statute is a class which cannot be reasonably limited to purchasers or vendors of these commodities. The only reasonable classification would include all persons who fail to make the best kind of contracts, for themselves, to avoid the losses of trade. (11) The statute is analogous to price-fixing laws which may be supported only where a business is impressed with a public use. The business of selling these commodities may not rightly be so characterized. These buyers and sellers are entitled, under the Constitution, to make the best they can

of private bargaining. (12) But if the law is viewed as a restriction upon a business which is subject to regulation there remains the inescapable fact that there is something more affected, in this case, than any business. (13) The statute affects the property rights involved in the ownership of each and every commodity both before and after its original sale. It impairs or destroys the right of contract between the original purchaser and those with whom he may deal. So that the rights of appellant must be viewed in the same manner as the right of each one of a hundred thousand farmers each owning certain of these commodities but not engaged in the business of sales.

If we have failed to establish these propositions in an affirmative sense it would seem that the lack of proof is due to our failure to present some sort of statistics, text book references or expert testimony. But such evidence is not within the means of the ordinary suitor, attempting to assert his constitutional rights. And we find it difficult to believe that there can be said to be an absence of proof where the fact is self-evident. It would seem that tremendous danger lurks in the theory that the presumption of valid legislative reasons, for a law, may only be overcome by evidence directed to the questions which we have attempted to discuss. If the facts can be made issuable, in the sense that they are subject to proof, it would seem difficult to avoid the conclusion that those facts must be passed upon by trial judges or juries acting according to the expediency of the moment, instead of a body of justices learned in the history and philosophy of constitution law, as well as its rules. As we understand this requirement for allegation and proof of facts, it seems to have been developed with or on account of views not infrequently expressed in the past and last stated at the conclusion of the minority opinion in *New State Ice Co. v. Lieb-*

mann, supra, 76 L. Ed. Adv. Sheets 501. No one can deny the powerful economic and sociological appeal which goes with the theory that a given state should have a freer hand in legislative experiment. But the accomplishment of such an end would seem to naturally lead to the point expressed (*Id.*) as follows:

> "A single courageous state may, if its citizens choose, serve as a laboratory and try novel, social and economic experiments without risk to the rest of the country."

Because North Dakota peculiarly fits the description of a state whose citizens are prone to undertake the new and novel in legislation, we respectfully ask this court to give consideration to the fact that it is in just such a state that the minority must need the protection of property rights granted to them by the 14th Amendment to the Constitution. What is done in North Dakota may not adversely affect other states but what is done in North Dakota is of gravest consequence and import to citizens who live or transact business in North Dakota and who hope that the Constitution may there be given the same effect as in any other state or in the nation as a whole.

While repeating our apology for the length and elaboration of this discussion we offer the excuse that we have seen no other possible way to conform to what has been written in recent decisions of this court. To illustrate, we have been obliged to show that the evil *aimed at* does not exist. In the process of disclosing a public evil we must admit there was something at which the law was directed; whereas, to show by proof that there was no public evil to be remedied would be an almost impossible task. In the attempt to establish the existing evil we have not dared to trust to the statement that the law proves the point on its face. And we have felt

obliged to shut out room for conjecture, so that it may not be rightly said that there is some possible public object in the law, undisclosed. And, having defined this public evil, we have attempted to show that the remedy is inappropriate and unreasonable. Believing that the necessity for and difficulty of this task may justify the apparent offense against brevity, we respectfully submit that Chapter 238, *Laws 1919*, is void.

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